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Supreme Court of the United States

OCTOBER TERM, 1955

No. 319

HAISLIP BAKING COMPANY, INCORPORATED

Petitioner

vs.

UNITED CONSTRUCTION WORKERS and
UNITED MINE WORKERS OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Haislip Baking Company, Incorporated (herein referred to as Plaintiff), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on June 13, 1955, wherein said Court reversed the judgment of the United States District Court for the Western District of Virginia at Abingdon, and remanded the case with direction to enter judgment for Defendants.

A transcript of the record in said case, including the proceedings and all matters in the United States Court of Appeals for the Fourth Circuit, is furnished herewith in accordance with the Rules of this Court.

OPINION BELOW

No opinions were rendered in the District Court. The opinion of the Fourth Circuit Court of Appeals, delivered June 13, 1955, will be reported in .....F (2d) ..... *and is printed as a part of the appendix to this Petition. It has been reported in Paragraph 69, 316 of C. C. H. Labor Law Reports.

JURISDICTION

The judgment of the Court of Appeals reversing the trial court's judgment with directions, as aforesaid, was entered on June 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

1. Did the defendant Unions violate the contract?

2. Did the agents of the defendant Unions participate in, ratify or encourage the continuation of the strike?

3. Was there substantial evidence to support the verdict of the jury?

4. Were the defendant Unions bound by the acts of their agents, Morris and Belcher?

5. Was it error for the District Court to order a new trial on the sole issue of damages?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are contained in Section 301 of the Labor Management Relations Act of 1947 and as codified in 29 U. S. C. A., Section 185. That Section is as follows:

> **"Suits by and against labor organizations — Venue, amount, and citizenship**

*At the time this petition went to the printer the case had not been reported in the Federal Reporter.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purpose of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title III, § 301, 61 Stat. 156."

STATEMENT OF THE CASE

(1) The Basis for Federal Jurisdiction:

The Federal District Court for the Western District of Virginia had jurisdiction of this case under the provisions of 29 U. S. C. A., Section 185. This was a suit for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce. The Defendants had duly authorized officers or agents engaged in representing or acting for its employee members in the Western District of Virginia.

(2) Pleadings, Trial Proceedings and the Court of Appeals Judgment:

The Haislip Baking Company, a corporation, brought an action in the United States District Court of the Western District of Virginia against the United Construction Workers and the United Mine Workers and sough damages against the defendants in the amount of $762,611.53 for actual damages and $250,000,00 for punitive damages. The material allegations of the complaint were:

1. On April 23, 1949, plaintiff executed a written contract with the "United Construction Workers, affiliated with United Mine Workers of America". This contract was renewed for one year on April 23, 1950, with no substantial changes and contained the following pertinent provisions:

ARTICLE III

"Section 1: All employees of the Company realize

that the business done by the Company and consequently the employment the Company is able to give depends largely upon the giving of proper service to customers at all times, and agree to co-operate fully in giving such service.

ARTICLE VII

Section 1: A strict rule of seniority shall be applied; taking into consideration training, ability, skill and efficiency of employees.

Section 4: Any employee who fails to report for work, or make satisfactory explanation of his absence, shall be considered as a voluntary quit and shall lose his seniority rank.

ARTICLE VIII

Section 1: An employee whose actions in the opinion of the Company management warrants or necessitates his dismissal from the employment of the Company shall not be immediately discharged, but shall be first suspended. Within three (3) days (excluding Saturdays, Sundays and Holidays) following such suspension, the employee or the Union may appeal the case through the Grievance Committee to the Company, and unless then settled within three (3) days (excluding Saturdays, Sundays and Holidays) may also carry the case through to an Umpire or Arbitrator as herein provided.

Section 2. In the event it shall be determined by the methods provided in this contract that an employee has been illegally discharged, then such employee shall be entitled to receive his regular wages for the period of time during which he was out of work on account of such illegal discharge.

ARTICLE X

Section 1: In the event that the above process of adjustments do not result in settlement of differences,

within seven (7) days, it is mutually agreed by the Company and the Union that the case in dispute may be referred to a Board of Arbitrators to be created as hereinafter provided, whose decision shall be final.

ARTICLE XVI

Section 1: The contracting parties agree that, as a part of the consideration of this agreement, any and all disputes, stoppages, suspensions of work, and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties, settled and determined exclusively by the machinery provided in the "Settlement of Disputes" in Articles IX and X of this agreement, or by the full use of free collective bargaining as heretofore known and practiced."

2. On May 29, 1950, plaintiff advised two employees that they were "automatic quits" and were suspended under the contract. Soon thereafter all the union members walked out, and the bakery was shut down. The next morning a meeting was held at the plant with Joe Morris, Regional Director of the United Construction Workers. After conferring with the employees, Morris informed the plaintiffs that it could resume operations provided the two suspended employees were promptly put back to work with full seniority rights. The plaintiff advised Morris that such action on its part would be a flagrant violation of the contract, that the Union had a complete remedy under the arbitration clause of the contract and that if the company was wrong the two suspended employees would be fully re-instated with pay. Morris announced that he would not discuss the contract or any provision thereof; that the two suspended employees had to be put back to work. The plaintiff replied it must stand on its contract and plead with the Regional Director and Field Representative to do the same. With the remark "Let's all go home," Morris walked out of the plant, conferred a few minutes with the employees and then all of them disappeared. The employees never returned to work.

3. That as a direct result of the arbitrary, unlawful, wilful and malicious acts of the agents or officers of the defendant in consumating the breach of the written contract, the plaintiff was compelled to lose $12,611.53 in wrappers, ingredients and other supplies on hand and $750,000.00 in present and future profits from a successful and industrial business which it had established over a period of years.

4. That in arbitrarily closing down the plaintiff's plant and forcing it out of business, as a result of the strike of May 29 and 30, 1950, the defendant utterly disregarded the legal and contractural rights of the plaintiff; and the defendant wantonly, wilfully and maliciously destroyed the plaintiff's business with a criminal indifference to their legal and civil obligations and therefore asked for punitive damages against the defendant in the sum of $250,000.00.

The complaint also alleged that this action is brought pursuant to authority granted in the Labor Management Relations Act of 1947 as codified in U.S.C.A., Title 29, Section 185 (a).

The defendants filed separate answers in which, among other defenses, they denied that they committed, had knowledge of, or participated in or authorized or ratified the commission of any of the alleged wrongful acts, denied any breach of the written contract, denied that its representatives refused to discuss the contract or comply with its provisions. In their answers the defendants admitted "as appears from a reading of that contract and from the averment of the complaint, the two employees, Hobert Walters and James Hensley, were 'voluntary quits' and no longer in the employment of the plaintiff." The defendants also filed motions for Summary Judgment which were overruled. Defendants also filed a motion for partial Summary Judgment by eliminating from the action all claims for punitive damages. This motion was sustained.

Upon a trial by jury, a verdict of $462,611.53 was returned. By order of September 29, 1954, the trial court set aside the verdict as excessive and awarded a new trial as to damages, only.

By leave of court, plaintiff amended its complaint alleging that as a direct result of the unlawful acts of the agents or officers of the defendants in consummating the breach of the written contract, plaintiff was forced to shut down and abandon its plant and that it has lost its bakery business, that it has lost wrappers, ingredients and other supplies on hand; that it has lost money on the sale of its real estate; that it has lost profits it would have made in the manufacturing and selling of its bakery products and that it will continue to lose profits in the future which it would have made from a successful and industrial business which it had established over a period of years. That as a result of the aforesaid breach of contract and of the destruction of an industrial business long established and continuously successful, the plaintiff has been damaged to the extent of $801,824.17. Total damages in the amount of $1,051,824.17 were asked.

A new trial on the issue of damages was had on November 22, 1954, and resulted in a verdict of $165,000.00 on which the trial court entered judgment. Defendants filed a motion to set aside the verdict and judgment entered threon and for judgment in accordance with defendants motion for a directed verdict, or in the alternative for a new trial. The motion was overruled by the trial court.

Upon appeal, the Fourth Circuit, by judgment entered June 13, 1955, reversed the trial court's judgment and remanded the case with direction to enter judgment for defendants.

(3) THE FACTS

This statement of facts will be based principally on the plaintiff's evidence which was supported by the jury's verdict. All references will be to the appellant's appendix unless otherwise indicated.

Mr. Fred Haislip had been engaged in the baking business in Logan, West Virginia, since 1921. In 1933, he executed a Union contract with the CIO and later they changed over to United Construction Workers. During

those several years he had no difficulties with his employees or with the Union.

Having become interested in the baking business in Norton, Virginia, he purchased the Sanitary Bakery in that town on August 1, 1939. That was a small bakery located on 7th Street for which he paid $20,000.00. The name was then changed to Haislip Baking Company, Incorporated.

In 1940 its sales were $120,045.64, and its gross profit $35,811.90. In 1948 its sales had increased to $572,501.28 and its gross profit to $139,780.79. The business therefore outgrew the small plant and it was necessary to acquire larger quarters. Whereupon, the corporation purchased about four acres of land on 12th Street upon which it constructed a modern plant entirely of concrete and steel. The new building had a floor space of 33,000 square feet, with a railroad siding adjacent thereto. Production at the new plant was approximately 3500 loaves of bread per hour (248). The cost of that plant, including equipment and facilities, was in excess of $330,000.00. (247)

Until April 2, 1949, the Haislips had operated their bakery in Norton without any contract with the Union. On the night of April 2, 1949, Mr. Haislip was in his home in Logan, when I. G. Stone, Agent for United Mine Workers of America, called him over long-distance telephone from Norton. Mr. Stone advised Mr. Haislip that his plant in Norton was shut down by a strike. Mr. Haislip advised Mr. Stone to get in touch with Fred Haislip, Jr. Later that night Mr. Stone and several of the employees went to the bakery and told Fred Jr., they wanted to organize a union. Fred, Jr. said they had operated under a union contract in West Virginia for several years and they would discuss the proposition.

Mr. Haislip came to Norton the next day, which was Sunday, and had a meeting with the employees. When asked if he would talk to the Union representatives, Mr. Haislip said "certainly, I will." I. G. Stone, Charles Minton and Bugs Bloomer, Representatives of the United Mine Workers of America, Marshall Belcher, Representative,

and Ralph Green, Regional Director of U.C.W., then joined the meeting. Some question arose about Stone, Minton and Bloomer being present but Mr. Green said " it is all the same Union" (250).

Mr. Green announced that he came over to negotiate a union contract. Mr. Haislip said he had no objection to a Union contract; that he wanted to get the plant back to work as quickly as possible. Mr. Green then turned to the employees and said "you boys get back to work." Thereupon all of them returned to work immediately. (250)

After some negotiations, the contract was duly signed. It was a one year contract beginning April 22, 1949. On April 22, 1950, that contract was renewed, with few changes, for another year. After April 22, 1949, several grievances arose, but they were all settled. Two or three were serious and they were settled by arbitration. The plant was not shut down for one single minute.

On May 28, 1950, two employees, Hobert Walters and James Hensley, did not work. That evening after the other employees quit work for the day and went to the locker room, B. H. Collier, Jr., member of the Grievance Committee, said that if the Haislips tried to fire those two boys when they came back, he would whistle and they would all walk out (143). Early the next morning when the driver-salesmen were loading their trucks, W. H. Wright, Chairman of the Grievance Committee remarked that "if those two boys don't work, there will be no bread baked here today." Later in the day Walters and Hensley reported for work. Not finding their time cards in the rack, they asked the Superintendent where they were. The Superintendent replied, "I have nothing for you (time cards) if you have nothing for me (excuses)." Walters answered "We have nothing for you." The Superintendent handed them their time cards and told them to go and check out (304); they were voluntary quits" under the contract. When B. H. Collier, Jr. heard what had happened, he whistled and immediately thereafter "everybody just quit and walked out" (143).

The Haislips were then summoned to the bakery. Fred Haislip, Jr., tried to reason with Walters. He told him he had rights under the contract; that if he felt he had been harmed he could make a grievance and it would be handled in the usual manner (252). Walters would agree to nothing. Fred, Jr., then drove to the home of James Starnes, President of the Local, and brought him back to the bakery. Starnes talked to the employees and found out about the trouble. Members of the Grievance Committee then went to the Haislips and tried to settle the dispute but, as the Chairman of that committee said, "to my satisfaction we couldn't settle it" (358), because the Haislips wanted to go by the contract (362).

Certain employees realized that when any trouble came up they always called a Union official; that they were supposed to do that; that when they could not settle the dispute with the company they took it to the Union; that it was then left up to the Union and management; and that the employees had nothing further to do with it. Chairman Wright said that he had read the contract; that in grievance procedure if the Committee could not settle anything, then the next procedure, according to the contract, was to call a Union official (357, 362). James Starnes, President, tried to call Mr. Belcher because it was his duty to do so. He could not find him. Pursuant to his understanding Chairman Wright called Mr. Belcher and located him. Meanwhile, the Haislips called Mr. Belcher at his home but he was not there so they called Joe Morris, Regional Director, in Kingsport. Mr. Morris said he would send Mr. Belcher to the Bakery immediately. Later on Mr. Belcher came up, (60) but when he failed to enter the bakery the Haislips called Mr. Morris again. Mr. Morris advised the Haislips that he would be at the bakery the next morning at 9:30 for a meeting.

That morning, May 30, 1950, the meeting was held between the Company and the Union. Fred Haislip, Fred Haislip, Jr., Hampton Haislip and Fred B. Greear, attoroney, represented the Company. Joe Morris and Marshall Belcher represented the Union. The Grievance Com-

mittee and numerous other employees were also present. Mr. Morris began to talk about wildcat strikes and other matters not pertinent to the issue. The bakery had been down almost twenty-four hours and Mr. Haislip was getting nervous and anxious to get the plant back into operation. So the Company representatives agreed to leave the meeting so that Mr. Morris could talk to the employees.

Just what happened between Mr. Morris and the employees at that time is difficult to say. Some witnesses said he sat there and blew smoke rings, some said the employees took a vote, and some said Mr. Belcher went outside and talked to the employees, some said he did not, while others said nobody got in a word but Mr. Morris (107), and that he said a whole lot of nothing (131). Not a single witness at that meeting, as we recall, testified that Mr. Morris advised or told the employees to return to work.

After thirty or forty-five minutes, Mr. Greear and the Haislips were called back into the meeting. Thereupon Mr. Morris announced " I have decided to let you go back to work". To which Mr. Haislip replied " I am glad, we ought to be back now." Mr. Morris then added, "But you have to put these two men back to work first." Mr. Haislip said, "That would be a violation of the contract." Mr. Morris replied, "WE won't discuss the contract." Mr. Haislip tried to explain to Mr. Morris that some of the other employees would get promotions and an increase in wages under the contract if the two men were not put back to work. Mr. Morris kept repeating that he would not discuss the contract. Mr. Haislip said he could not work under a violated contract. Mr. Morris then turned to the employees and said "Boys, let's get out of here." Mr. Haislip finally said "Wait a minute, you are putting us out of business, and we will hold you responsible." Mr. Morris just smiled and his final words were "We have been sued before. Come on boys, let's go" (62, 156, 254).

When Mr. Morris left the meeting one employee asked him when they were going back to work. In the presence of several employees Mr. Morris replied, "You will go back to work when I tell you to and not before" (84,101).

Mr. Morris then got in his car and left. That was the last time the Haislips ever saw or heard from him.

After the meeting, the Haislips got busy trying to clean up the bakery. Bread was all over the place, some half cooked, and several thousands pounds of dough was on the floor. In spite of that mess the Union employees would not help the Haislips clean up the plant.

On the morning of May 31, Mr. Haislip returned to Logan. Before he left he instructed Fred Jr., and Hampton to open the plant immediately if Mr. Morris would let the employees return to work (64,158,257,258). Fred Jr., "was pretty well shaken up" so that afternoon a friend asked him to go to Florida. He went and was gone about a week. On May 31st, Mr. Greear, attorney, wrote a letter to James Starnes, President of the Local, and to Mr. Belcher and Mr. Morris in which he advised them that the Haislip Baking Company had gone out of business (165). Later that day, after the letter had been mailed, but before it was received, Mr. Belcher went to Mr. Greear's office where he was shown a copy of the letter. Mr. Belcher said nothing to Mr. Greear about any meeting at Dorchester or that the employees were willing to return to work. However, a day or two after that Mr. Belcher returned to Mr. Greear's office and told him the men had had a meeting at Dorchester and had voted to go back to work without the two discharged employees. Mr. Greear told Mr. Belcher to see the Haislips because he had nothing further to do with it (234). Mr. Belcher made no effort to see the Haislips. Neither did Mr. Greear. The Haislips did not see that letter, or a copy thereof, and never heard of it until some two years later (63,162,258).

The Union tried to show that there was a meeting held at Dorchester on the afternoon of May 31, and that a majority of the members present voted to return to work without the two men. If such a meeting was held, a substantial number of the employees were not present and heard nothing about any such meeting. Be that as it may, several witnesses for the Union testified that they appointed Mr. Belcher and the Grievance Committee to noti-

fy Mr. Greear **and the Haislips** (305,308,348,383), but no one made any effort to see the Haislips. If so the bakery would have reopened, according to the Haislips (171,175, 176, 269, 270).

During that day and the following days, Hampton Haislip remained at the bakery trying to get it cleaned up. A majority of the employees were still hanging around going in and out of the plant. They all wanted to return to work but were waiting to hear from Mr. Morris and Mr. Belcher (160). Hampton posted a small typewritten sign on the door notifying the employees to be there Saturday morning to get their pay. At the end of the week the Haislips took steps to hold their business. They made arrangements with Modern Bakery of Harlan, Kentucky, whereby Haislips would lease ten of its trucks to Modern. Haislip's driver-salesmen were to operate them and deliver Modern's bread to Haislips' customers. The purpose was to maintain Haislips' position in the stores with their customers. If they could get started back they would have "their foot in the door" (162). That effort continued approximately six weeks.

On the night of May 31, the Mayor and Town Manager of Norton, with several citizens, had a meeting with Hampton Haislip at the bakery and tried to get him to open nonunion. Hampton advised them that would be a violation of the contract and they were not big enough to fight the United Mine Workers (177).

During the next several days a large number of the employees were hanging around the bakery, most of them going in and out. On Saturday, June 3, most if not all of the employees called at the bakery to get their wages. Mr. Belcher passed by the plant most every day. In fact, he was keeping a "close check watching" the bakery, so were members of the Union, so was the District Office of the U.M.W.A. and the Representatives. Yet not a single person notified the Haislips that the employees were ready and willing to return to work. No employee, no member of the Union, no officer of the Local, no member of the Committee, and no official of the Union even tried to get in touch

with the Haislips. If anyone had notified them, the Haislips would have opened up on June 1, or June 2 or June 3 (270) or as late as February 1951 (262,269).

(4) THE CONCLUSION OF THE COURT OF APPEALS

The Court of Appeals for the Fourth Circuit reversed the judgment and remanded the case with direction to enter judgment for defendants. The court held that there was no evidence that Morris or Belcher adopted, encouraged or prolonged the continuance of the strike and that there was no showing of either express or implied authority on the part of either Morris or Belcher to adopt on the part of the defendants a "wildcat" strike of this character. The Court of Appeals further held that even if this were not so, that the verdict on the first trial should have been set aside in its entirety and a complete new trial ordered and it was error to order a new trial on the issue of damages and submit that issue just as though breach of contract and right to recover for destruction of business had been established, without reference to the rule of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145, or the duty of an aggrieved party to mitigate damages.

ARGUMENT AND REASONS RELIED ON FOR THE GRANTING OF THE WRIT OF CERTIORARI

FIRST

QUESTION: Did the Defendant Unions violate the contract?

This is an action brought under Section 301 (29 U.S.C.A. Section 185) of the Labor Management Relations Act. This section provides for suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. The Plaintiff's evidence showed that there was a violation of the contract by the labor organization.

The contract was between the Haislip Baking Company and the "United Construction Workers, affiliated with the United Mine Workers of America, hereinafter referred

to as the Union" (See Appellants' Appendix Page 12). It was signed by Joe Morris, Regional Director, and Marshall Belcher, Jr., Representative. The contract provided a method for the settlement of disputes. The pertinent provisions of that contract are:

> "The Company recognizes the Union as the sole collective bargaining agency for all its employees as hereinafter defined. Art. II, 1.
>
> "All employees of the Company realize that the business done by the Company and consequently the employment the Company is able to give depends largely upon the giving of proper service to customers at all times, and agree to cooperate fully in giving such service, Art. III, 1.
>
> "The . . . right to hire, suspend or discharge for proper cause . . . is vested exclusively in the Company . . . Art. III, 2.
>
> "A strict rule of seniority shall be applied . . .Art. VII, 1.
>
> "When the working force is . . . decreased, the principle of seniority shall prevail. . . Art. VII, 3.
>
> "Any employee who fails to report for work, or make satisfactory explanation of his absence, shall be considered a voluntary quit and shall lose his seniority rank. Art VII, 4.
>
> "An employee whose actions in the opinion of the Company management warrants or necessitates his dismissal from the employment of the Company shall not be immediately discharged, but shall first be suspended. Within three days . . . following such suspension, the employee or the Union may appeal the case through the Grievance Committee to the Company, and unless then settled within three days . . . may also carry the case through to an umpire or arbitrator as herein provided. Art. VIII, 1.
>
> "In the event it shall be determined by the methods provided in this contract that an employee has been illegally discharged, then such employee shall be entitled to receive his regular wages for the period of time during which he was out of work on account

of such illegal discharge. Art. VIII, 2.

"The term "Grievance" as used herein, means any matter of dissatisfaction on the part of any employee or group of employees, or the management in connection with subjects covered by this contract. Art. IX, 2.

"Avenues of Grievance Adjustments shall be: First, between the employee and his foreman or supervisor; second, between the members of the Grievance Committee and the General Manager of the Company affected; third, between the District Representative of the Union and the Company's General Manager or Owner affected. Art. IX. 3.

"In the event that the above process of adjustments do not result in settlement of differences, within seven days, it is mutually agreed by the Company and the Union that the case in dispute may be referred to a Board of Arbitrators to be created as hereinafter provided, whose decision shall be final. Art. X, 1.

"The contracting parties agree that, as a part of the consideration of this agreement, any and all disputes, stoppages, suspensions of work, and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties, settled and determined exclusively by the machinery provided in the Settlement of Disputes, in Article IX and X of this agreement, or by the full use of free collective bargaining as heretofore known and practiced. Art. XVI, 1."

A method was provided for handling just such a dispute as arose at the Haislip Baking Company. Morris and Belcher were called in accordance with Section 3, Article IX of the contract. The Plaintiff's evidence showed a clear violation of the contract by Morris.

Mr. Fred Haislip, Sr., testified that Morris stated, "We won't discuss the contract" not once but three times (61 & 62). When Mr. Haislip refused to operate on the basis of violating the contract, Morris turned and said, "Come on boys, let's get out of here" (62). He is corroborated by the evidence of Hampton Haislip (156) and the evidence

of Fred Haislip, Jr. (253 and 254). Robert Carson Hubbard, former employee, testified that Morris refused to submit it to arbitration (101).

Jack McDonald, another former employe, testified that Mr. Haislip wanted the employees to go back to work without the two men that had been dismissed, and take it up before an Arbitration Board and let the plant continue to operate, and that Mr. Morris would not agree to that (112). He also testified that Mr. Morris could have gotten the employees to go back to work had he told them to go back (114).

Pearl McDonald, another employee, testified that Mr. Morris stated that the only way they would go back was with the two boys (131). He further testified that Mr. Morris did not try to get them to go back (131).

Robert Mangum, another former employee, testified that in a meeting which Mr. Morris had with the employees he (Mr. Morris) decided "we wouldn't go back to work unless they took the two employees back" (136).

With a jury's finding in favor of the Plaintiff, a Court of Appeals is bound to accept the above testimony as true. This action on the part of Mr. Morris was a violation of the contract.

> "Anything so material and important as in truth and fairness to defeat the essential purpose of the parties is a breach of contract". 4 Michie's Jur. 429; F.A.D. Andrea, Inc. v. Dodge (Pa) 15 F. 2d 1003, affirmed in 28 F. 2d. 145.
>
> "An absolute renunciation of a contract by one of the parties thereto constitutes a breach thereof for which he is liable in damages." 12 Am. Jur. 963; Restatement, Contracts, Vol 1, 312.

In the teeth of the above mentioned evidence the Court of Appeals in its opinion stated: "It is argued that it was the duty of Morris and Belcher, as representing the Union, to consent to arbitration under the contract of the grievance which had arisen. So it was; but the evidence shows that they were willing to consent to arbitration and pro-

posed it." This conclusion of the Court of Appeals is based on Defendant's evidence, which was rejected by the jury, and this statement would refute Plaintiff's evidence. There was some evidence on the part of the Defendant that such a proposal was made to the employees by Belcher and a small amount of evidence that this was transmitted to the Haislips. However, Plaintiff's evidence would refute any inference that such a proposal was made to the Haislips. This was an issue of fact and was resolved in favor of the Haislips and it was approved by the District Court. Under those circumstances the judgment should be upheld if there is any substantial evidence to support it. Chesapeake & Ohio Railway Co. v. Coffey, 37 F. 2d 320.

Petitioner states that the above cited evidence supports its judgment. The Circuit Court of Appeals departed from the usual course of judicial proceedings in failing to accept as true this evidence on behalf of the Plaintiff and all fair inferences which may be drawn therefrom and basing their finding on the Defendant's evidence. This case should be reviewed by the Supreme Court for that reason.

SECOND

Question: Did the agents of the Defendant unions participate in, ratify or encourage the continuation of the strike?

This was an issue of fact. It was squarely put to the jury in this portion of the Court's charge:

> "This suit is against the United Construction Workers and the United Mine Workers of America. These defendants would not be liable unless their agents Morris and Belcher, after learning of it, one or both of them, participated in, ratified or encouraged the continuance of the strike. If you believe from a preponderance of the evidence that on May 30, 1950, Morris and Belcher, either or both, agents of the defendants, acting within the scope of their authority, participated in, ratified or encouraged the continuation

of the strike, in violation of the contract, you should find for the plaintiff; on the other hand, unless you believe from a preponderance of the evidence that Morris and Belcher, either or both, agents of the defendants, acting within the scope of their authority, participated in, ratified, or encouraged the continuation of the strike, in violation of the contract, you should find for the defendants." (421-422).

There was ample evidence to support the finding of the jury that the Defendants adopted, encouraged or prolonged the continuance of the strike.

There was evidence that even before this strike at almost every meeting of the employees the Union officials would say that the Haislips had too much invested and would not close down (109); that the slogan from the Union officials was "Hold out, if you get anything you have to strike for it" (110); that Mr. Belcher wanted the employees to put the pressure on the Haislips and when one employee objected to such practice Mr. Belcher threatened to throw him out of the meeting (124).

After the strike occurred Mr. Morris and Mr. Belcher came down to confer with the Haislips. Mr. Morris then conferred with a group of the employees in the Haislip building. Robert Mangum, a former employee, testified that in that little meeting he (Mr. Morris) decided we wouldn't go back to work unless they took the two employees back (136).

After this conference with the employees Mr. Morris called the Haislips back into the office where he was and informed Mr. Haislip that "I have decided to let you go back to work" (61). But Mr. Morris further told the Haislips that they would have to put these men back to work (61). The Haislips refused to do this because it would be a violation of the contract, and after Mr. Morris refused to discuss the contract Mr. Morris turned and said, "Come on boys, let's get out of here" and in the words of Mr. Fred Haislip, Sr.: "And I said, 'Wait a minute, you are putting us out of business, and we will hold you responsible.' And

he just smiled and said, 'We have been sued before, come on boys,' and he had a cigarette in his hand and waved it at me and said, 'Come on boys, let's go' and walked out of the door with my employees and business." (62).

Giles Combs, Jr., a former employee, testified that he saw Mr. Morris when he left that meeting and his testimony was as follows:

"Q. Did you see Mr. Joe Morris when he left that meeting? A. Yes, sir, I saw him when he came out and we asked him, hoping he would let everybody go back to work and settle it while we was working so we wouldn't lose any money.

"Q. What did Mr. Joe Morris say to that? A. He said, 'You will go back to work when I tell you and not before,' and that was the last I ever saw of him.

"Q. Who was present when he made that statement? A. I don't remember. There was several people but I don't remember their names.

"Q. Were they employees? A. Yes, they were all employees.

"Q. How many would you say heard him make that statement? A. I couldn't say, but several heard it.

"Q. Now did Mr. Morris ever ask you or try to get you to go back to work? A. No, sir, I never did see him after that."

He was corroborated in this evidence by Jack McDonald (112).

The jury was fully justified in finding that the agents of the Union participated in, ratified or encouraged the continuance of the strike from the above evidence. This action on the part of Mr. Morris certainly ratified the strike and encouraged its continuance. In Am. Jur. 166-8:

> It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to

act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies authority to do the act. In such cases the principal, whether a corporation or an individual, is bound to the same extent as if the act had been done in the first instance by his previous authority; this is true whether the act is detrimental to the principal or to his advantage, whether it sounds in contract or tort, or whether the ratification is express or implied.

In spite of the above evidence the Circuit Court of Appeals stated this in their opinion:

"The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did."

In making this finding the Court of Appeals gave no weight to the above cited evidence, which was found to be true by the jury's verdict. In so doing the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, and for that reason a writ of certiorari should issue.

THIRD

Question: Was there substantial evidence to support the verdict of the jury?

There was evidence offered by plaintiff that Morris refused to discuss the contract and in effect, repudiated the contract. It is set out in detail under the first section of this heading. There was evidence that Morris ratified the strike and encouraged the continuance of the strike. It was set out in detail in the second heading.

Since this is an important point, we would again refer the court to the evidence of Mr. Fred Haislip, Sr. (61) and (62), Hampton Haislip (156), Fred Haislip, Jr. (253 and 254), Robert Carson Hubbard, (101), Pearl McDonald,

(131), Jack McDonald (112), Robert Mangum (136), Giles Combs, Jr. (184).

In short, this evidence showed Morris decided that the men would not go back to work without the two employees, that Morris refused to discuss the contract, that Morris told the employees "Let's get out of here" and when some employees asked Morris when they were going back to work, he told them "you will go back to work when I tell you and not before".

"Substantial evidence" is evidence which if true has probative force on the issues. See words and Phrases, Vol. 40, page 499.

The above stated evidence supported the jury's findings and the findings and verdict should not have been disturbed. In 1 Michies Jur., page 684:

> "Where the case has been fairly submitted to a jury, their verdict will not be disturbed where there is evidence sufficient to support the verdict"
>
> 1 Michies Jur. 690:
>
> "A verdict approved by the trial court cannot be disturbed by the court of appeals unless it is wholly without evidence to support it, or is so plainly wrong as to leave no doubt upon the subject"
>
> 3 Am. Jur. 444:
>
> "On a challenge to the sufficiency of the evidence to support the verdict, the question presented on appeal is, admitting the truth of all the evidence of the plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom, and eliminating all evidence of defendant in conflict with plaintiff's evidence, and all opposing inferences, whether there is any competent evidence tending to support the verdict against the defendant."

It is true that on the question of violation and ratification, the evidence was in conflict. However, the plaintiff, with the jury's verdict, is entitled to have the evidence considered in the light most favorable to him. In 1 Michies Jur. 692:

"Where a verdict in favor of a plaintiff is approved by the trial court, the court of appeals need look only to so much of the evidence as is favorable to him. Stated another way, a party who is fortified by the verdict of the jury and the judgment of the court in his favor, is entitled to have his case stated and considered in the court of appeals in the light most favorable to him which accords with the evidence."

In McDowell v. Dye, 193 Va. 390, 69 S. E. 2d 459:

"Here we have the verdict of a jury, approved by the trial judge, which brings the case to us practically as upon a demurrer to the evidence. Section 8-491, Virginia Code. In this situation plaintiff's evidence and all fair inferences which may be drawn therefrom must be accepted as true and evidence in conflict therewith is waived."

In Burrell v. Burrell, 193 Va. 594, 70 S. E. 2d 316:

"We have repeatedly held that 'It is not sufficient that the judge, if on the jury, would have rendered a different verdict. It is not sufficient that there is a great preponderance of evidence against it. If there is conflict of the testimony on a material point, or if reasonably fair-minded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court, or by this court, or if improperly set aside by the trial court, it will be reinstated by this court'. Hoover v. J. P. Neff & Son, 183 Va. 56, 62-63, 31 S. E. 2d 265,268."

FOURTH

Question: Were the defendant Unions bound by the acts of their agents, Morris and Belcher?

The Fourth Circuit Court of Appeals, in its opinion, stated "We think also that there is no showing of either express or implied authority on the part of either Morris or Belcher to adopt on the part of the defendants a 'wild-

cat' strike of this character."

However, Section 301 (b) of the Labor Management Relations Act, 29 U. S. C. A. (185), provides that labor organizations shall be bound by the acts of their agents. Section 301 (e) provides that in determining whether any person is acting as agent for such organizations "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling". To our knowledge, the Supreme Court of the United States has not yet given its interpretation of these two clauses of the Labor Management Relations Act. The Fourth Circuit, in giving its interpretation of this portion of the Act. has decided an important question of federal law which has not been, but should be settled by this court. Petitioners contend that at the time in question, Morris and Belcher were clearly acting within the scope of their employment and were engaged in their employer's business and that the Union is bound by their acts.

The contract is question was signed by Joe Morris as Regional Director and by Marshall Belcher, Jr., as Representative, (21). Section 3 of Article IX provided:

> "Avenues of Grievance Adjustments shall be: First, between the employee and his foreman or supervisor; second, between the members of the Grievance Committee and the General Manager of the Company affected; third, between the District Representative of the Union and the Company's General Manager or Owner affected.

The contract clearly showed that the parties contemplated that the Union representatives would attempt to settle such disputes. When Morris and Belcher came to the Haislip Baking Company, they were on the Union's business and just such business as was contemplated by the contract. They were acting in their capacity as Union representatives. When Morris refused to discuss the contract, he was about his employer's business. When he walked out and told the employees "Come on boys, let's get out of here", he was trying to bring Mr. Haislip around

to settling the dispute on his terms. When he told the employees that they would go back to work when he told them and not before, he was attempting to settle the dispute on his (Morris') terms. It was the job of the District Representative of the Union to adjust such grievances under the contract and whatever they did while trying to make such an adjustment was binding on their employer, the defendants. A somewhat similar situation was considered in United Electrical Radio and Machine Workers of America v. Oliver Corporation, 205 Fed. 2d 376. This case held:

> "Charles W. Hobbie who had signed the contract as representative of the International Union was a sort of labor relations expert charged by the International Union with the duty of assisting and advising the locals in his district in relations with employers. In the discharge of the duties entrusted to him Hobbie was a representative of both the Local and the International. He, together with Leo Newman, was active in all the meetings of the Union during this work stoppage, in promoting the so-called 'panther hunt', and in encouraging the interested Union members not to return to work. In view of the provisions of the Labor Management Relations Act, 1947, that in determining the responsibility of a labor organization for the acts of its agents the question whether the specific acts were authorized is not controlling, the question of the scope of Hobbie's agency, as well as that of Leo Newman, was for the jury."

In the case at bar, the question of the scope of Morris' and Belcher's agency was for the jury. It was presented to the jury in the courts charge (419 and 421).

FIFTH

Question: Was it error for the District Court to order a new trial on the sole issue of damages?

The Circuit Court of Appeals held that the verdict on the first trial was so excessive and so manifestly based on improper considerations, instead of upon the record, that

it should have been set aside in its entirety and a complete new trial ordered. The verdict in the first trial amounted to $462,611.53 There was evidence in the record to support the amount of this verdict. W. C. Southern, Jr., a witness for the plaintiff, testified that the sales in 1939 for the first year of operation were $51,497.14. The sales increased until 1949 in which year they were $1,142,517.14 (279). He further gave a complete summary of the income of this corporation from 1939 to 1949 as taken from the tax returns. He proved that the percent of profit made from the time plaintiffs started in 1939 through May 20, 1950, was .02786 (280 and Exhibit No. 44). Using this percentage, he showed that for each year they had $1,000,000.00 sales, you would have a profit of $27,860.00 (280). If the business continued to operate twenty years and had sales of $1,000,000.00 a year, using the same percent of profit, they would have a profit of $557,200.00, (281). Therefore, there was evidence in the record on which the jury could have based their verdict.

The Circuit Court of Appeals also stated that it was error to order a new trial on the issue of damages without reference to the duty of an aggrieved party to mitigate damages.

The defendants did not request an instruction on mitigation of damages, nor did the defendants assign the lack of such an instruction as one of their objections to the charge.

Rule 51 of the Federal Rules of Civil Procedure reads as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he

objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

CONCLUSION

Your petitioners, therefore, pray that this petition for a writ of certiorari should be granted and for the reasons herein assigned and discussed, and that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered as aforesaid on June 13, 1955.

Respectfully submitted.

August 10, 1955.

FRED B. GREEAR,
Norton, Virginia
WM. T. BOWEN
Norton, Virginia
ROBERT T. WINSTON, JR.
Norton, Virginia
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 6951

United Construction Workers and United Mine Workers of America,
Appellants,
versus
Haislip Baking Company, a Virginia Corporation,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ABINGDON

(Argued April 18, 1955. Decided June 13, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges:

Stuart B. Campbell and M. E. Boiarsky (Stuart B. Campbell, Jr., on brief) for Appellants, and Robert T. Winston, Jr., and Wm. T. Bowen (Greear, Bowen, Mullins & Winston on brief) for Appellee.

PARKER, Chief Judge:

This is an appeal in an action under section 301 of the Labor Management Relations Act, 29 USC 185 (a), to recover damages for alleged breach of a collective bargaining contract. The plaintiff is the Haislip Baking Company, a corporation of Norton, Virginia, and the defendants are the United Construction Workers and the United Mine Workers of America. The case was heard before a jury which returned a verdict for plaintiff in the sum of $462,-611.53. On motion of defendants for judgment n.o.v. or for a new trial, the judgment n.o.v. was denied but a partial

new trial awarded, which was limited to damages sustained by plaintiff "by being obliged to liquidate its business." On the new trial thus granted, the jury answered the interrogatory as to damages in the sum of $165,000; and from judgment for plaintiff in this amount, the defendants have appealed. The principal questions presented by the appeal are whether verdict should have been directed for defendants and whether the verdict rendered on the first trial should not have been set aside in its entirety for manifest bias and prejudice on the part of the jury.

Plaintiff began operating a bakery in Norton in 1939 with an initial investment of less than $20,000. Its business grew and prospered during the war years and in 1948 it greatly enlarged its plant, purchased new machinery and began doing business on a much larger scale, but its books showed a loss for the year 1949 and the portion of the year that it operated in 1950. In the latter year, its books showed total assets of $336,776.70 with total liabilities other than capital stock of $211,156.38 or a net worth of $125,620.32. In 1949 it entered into a collective bargaining contract with the United Construction Workers, a division of District 50, which was itself a branch or division of the United Mine Workers of America. The contract was signed by the Construction Workers as affiliated with the Mine Workers. The contract was renewed in April 1950, but a wage increase for which it provided was postponed until June of that year because of the financial condition of plaintiff.

On May 29, 1950 a strike occurred at the bakery because two employees were discharged for unexplained absence on the preceding day. There is no evidence and no contention that either of the defendants instigated, encouraged or had anything to do with this strike in its incepton. Plaintiff's officials called on one Morris, Regional Director of the Construction Workers and Belcher, its field representative, to assist in getting the men back to work and both came to the bakery on May 30 where they conferred with Fred Haislip Sr., plaintiff's president, Fred Haislip, Jr., its general manager, and Fred B. Greear, its attorney, and a number of representatives of employees. After some discussion, the Haislips and Greear withdrew

from the meeting so that Morris and Belcher could confer with the employees. They did confer and there is evidence that Belcher advised the men to go back to work without insisting on the reinstatement of the discharged employees but that they voted that they would not do so but would return to work only if the discharged employees were reinstated.

When the Haislips and Greear returned to the conference, Morris stated that the men would return to work at once if the discharged employees were put to work, and that the question of plaintiff's right to discharge them would be arbitrated under the provisions of the collective bargaining agreement. Haislip, Sr. agreed that the plaintiff's right to discharge the two men might be referred to arbitration, but declined to put them to work in the meantime, saying that this would be a violation of the contract. Upon his persisting in this position, Morris withdrew, saying that he would not discuss the contract. As he withdrew Haislip, Sr. stated "You are putting us out of business, and we will hold you responsible." There is also evidence that, as Morris left the meeting, one of the employees asked him when they were going back to work and that the replied "You will go back to work when I tell you to and not before"; but this was after they had voted not to return to work unless the discharged employees were reinstated and after the conference had broken up because of Haislip's insistence that he would not reinstate them. There is no evidence that at this, or any other time, either Morris or Belcher attempted to prevent their returning to work and the evidence is that Belcher advised them to return to work without insisting on the reinstatement of the discharged employees and, after the vote was taken, told them they had made a mistake.

There is no evidence of any further effort on the part of plaintiff to operate the bakery or to negotiate with defendants. A meeting of the employees was called by Belcher for the following day at Dorchester, which is two and one- half miles from Norton and is the place at which the local union had its meetings. At this meeting it was

decided by the employees to return to work without requiring the reinstatement of the two who had been discharged, and immediately after the meeting Belcher went to the office of Greear, the attorney, to notify him of the action taken. At that time, although it was on the day immediately following the meeting at the bakery, Haislip, Sr. had returned to Logan, W. Va. and Haislip, Jr., the manager of the business, had gone to Florida on a fishing trip. Greear showed Belcher a copy of a letter which he had written that morning addressed to Belcher, Morris and one Starnes, the president of the local union, which he had written at the direction of Haislip and which was signed by Greear as "Attorney for Haislip Baking Company". That letter was as follows:

> "Due to the fact that the members of Local Union ..... of the United Construction Workers has refused to abide by the terms of its contract with the Haislip Baking Company in defiance of the specific instructions of the Regional Director of the Union and its local field representative, and have thereby, through their present wildcat strike, destroyed the business of the Haislip Baking Company so that its customers have necessarily turned to other baking companies for their supplies, the Haislip Baking Company has decided that it will not be possible to operate the Bakery at a profit in the future. Accordingly, I am directed to advise that the Haislip Baking Company has gone out of business. All of the employees of the Company may call at the Company's office between 11:00 a. m. and 12:00 noon on Saturday, June 3, 1950, at which time they will receive any and all wages due them to the date on which they quit."

Belcher testified that he told Greear of the action of the employees in the Dorchester meeting at the same time he was shown the letter. Greear says it was two days later that he was told. Which is correct is not important, nor is it important whether the Haislips learned of the results of the Dorchester meeting, although it is inconceivable that they should not have learned of it promptly. The im-

portant fact is that immediately following the meeting on May 30, plaintiff went out of business and so notified the officers of the union, without making any further attempt to reach an agreement with the employees or to minimize the damages resulting from their action. Certainly damages resulting from such a precipitate closing out of business could not reasonably have been within the contemplation of the parties upon entering into the contract upon which plaintiff relies. It is a most pertinent circumstance, as bearing upon the bona fides of plaintiff's claim, that action was not instituted until more than two years after the occurrences now relied upon as constituting breach of contract and giving rise to the damages claimed.

The collective bargaining agreement does not contain a "no strike" clause. It does, however, provide for the handling of grievances by a procedure which it outlines with provision for arbitration, if this procedure does not result in a settlement of differences within 7 days. Another provision is that this procedure, or collective bargaining, shall furnish the exclusive method of settling disputes and grievances.

That section is as follows:

> "The contracting parties agree that, as a part of the consideration of this agreement, any and all disputes, stoppages, suspensions of work, and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties, settled and determined exclusively by the machinery provided in the 'Settlement of Disputes', in Articles IX and X of this agreement, or by the full use of free collective bargaining as heretofore known and practiced."

Plaintiff's contention is that, even though the contract did not contain a no strike clause, it constituted a breach for employees to strike on account of a grievance, such as the discharge of the two employees, instead of handling same through the grievance procedure and arbitration, as the contract provided. The District Judge so held and

held also that the strike here amounted to a breach of the contract by the local union. He submitted to the jury the question as to whether the defendants became liable for the breach through participation in the strike by their agents Morris and Belcher. His charge with respect thereto is as follows:

> "Article XVI, which I have previously read to you, specifically obligates the parties to settle and determine such a dispute 'exclusively by the machinery provided in the' contract. It was, therefore, the duty of the Union to settle the dispute growing out of the suspension or discharge of Hensley and Walters, as provided in the contract, and the action of the local union in striking and continuing to strike, instead of settling the dispute as they were obligated to do under the contract, constitute a breach of the contract. For this breach of contract, I charge you that the local union would be liable. However, the local union is not being sued in this action. This suit is against the United Construction Workers and the United Mine Workers of America. These defendants would not be liable unless their agents Morris and Belcher, after learning of it, one or both of them, participated in, ratified or encouraged the continuance of the strike. If you believe from a preponderance of the evidence that on May 30, 1950, Morris and Belcher, either or both agents of the defendants, acting within the scope of their authority, participated in, ratified or encouraged the continuation of the strike, in violation of the contract, you should find for the plaintiff; on the other hand, unless you believe from a preponderance of the evidence that Morris and Belcher, either or both, agents of the defendants, acting within the scope of their authority, participated in, ratified, or encouraged the continuation of the strike, in violation of the contract, you should find for the defendants."

We think that this passage of the charge stated the applicable law correctly. It is argued that a strike could not

constitute a breach of a contract which did not contain a no strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach. See Hazel-Atlas Glass Co. 4 Cir. 127 F. 2d 109; 31 Am. Jur. 1954 Cum. Supp. p. 174, sec. 198.5, note 2 A.L.R. 2d p. 1287 and cases there cited. It is argued also that the right to strike without becoming guilty of breach of the contract is preserved by the language which prescribes "the full use of free collective bargaining as heretofore known and practiced", as an alternative to the use of the grievance procedure and arbitration prescribed by the contract. Collective bargaining, however, has the well understood meaning in the law of settling disputes by negotiation between employer and the representative of the employees. See Virginian Ry. v. System Federation No. 40 300 U.S. 515; N.C.R.R. v. Highland Park Mfg. Co. 4 Cir. 110 F. 2d 632; Words & Phrases, Permanent Edition vol. 7A pp. 245-248, and cases there cited. When we enter orders directing parties to bargain collectively, we are certainly not directing anyone to strike.

Exceptions were taken to this portion of the charge on the ground that there was no evidence to support a finding that either Morris or Belcher participated in, ratified or encouraged the continuance of the strike, or that what they did or did not do with respect thereto was authorized by or was otherwise binding upon the defendants. We think that these exceptions were well taken and that for the same reason the defendants' motion for directed verdict should have been granted. What we are dealing with is, not a case where circumstantial evidence points to instigation of a strike by defendants or the agents who represented them, but a "wild cat" strike of local origin, without anything to suggest that defendants or their agents had anything to do with bringing it about. Morris and Belcher were called in to try to end the strike and get the men to go back to work, and everything that they did was directed to that end. Even if the testimony as to their

advising the men to go back to work be disregarded and it be assumed that they did nothing of the sort, there is no evidence to support the view that they adopted the strike, that they encouraged it or that they prolonged it.

The real question in the case is whether the defendants, because of entering into collective bargaining agreements with plaintiff requiring that grievances be settled pursuant to the procedure provided by the contract, are liable for damages caused by a "wild cat" strike entered upon on account of such grievances by local employees, but without the authorization or sanction of the defendants. We think that this question must be answered in the negative. The local union was liable because the strike, although informally commenced, unquestionably had the approval of the local union; but this was not true of the defendants.

There is nothing in the contract making defendants liable for "wild cat" strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in "wild cat" strikes lose the protection of the Fair Labor Standards Act and may be discharged by their employers with immunity for so doing. N. L. R. B. v. Draper Corporation 4 Cir. 145 F. 2d 199. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If Morris and Belcher had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did.

We think, also, that there is no showing of either express or implied authority on the part of either Morris or Belcher to adopt on the part of defendants a "wild cat" strike

of this character. It must be borne in mind that the strike did not arise out of organizational or other activities in which defendants had an interest and in which their representatives might be held to have implied authority to participate in protection of that interest. Cf. United Mine Workers of America v. Rudd Patton et al. 4 Cir. 211 F. 2d 742. It arose out of a grievance having no relation to organization or the interests of the defendants. It is hardly conceivable that authority to adopt, to participate in or to encourage such strikes, which are clearly inimical to the interests of a union, should be vested in field officers or regional directors. We find nothing in the record to justify a finding that either Morris or Belcher had such authority.

Section 301 (b) of the Labor Management Relations Act, 29 USC 185 (b), provides that labor organizations shall be bound by the acts of their agents; and section 301 (e) provides that, in determining whether any person is acting as agent for such organization "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling". As pointed out by Senator Taft, however, the purpose of these provisions was merely to apply the ordinary rules of the law of agency to labor organizations, notwithstanding resolutions on their part disclaiming responsibilty for the action of persons who, in reality, are acting in their behalf. In his analysis of the bill which ultimately became the Labor Management Relations Act, he made the following statement to the Senate, 93 Cong. Record p. 7001, Legislative History of Labor Management Relations Act vol. 2 p. 1622, viz.:

> "Section 2(2), 2(13), and 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent'. The term agent is defined in section 2(13) and section 301(e), since it is used throughout the unfair labor practice sections of title I and in sections 301 and 303 of title III. In defining the term the conference amendment reads 'the ques-

tion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the law of agency as it has been developed at common law.

"These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employers for the acts of their managerial and supervisory personnel. Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters placed upon section 6 of the Norris- La Guardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his action. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or

approve such conduct."

It is argued that it was the duty of Morris and Belcher as representing the union to consent to arbitration under the contract of the grievance which had arisen. So it was; but the evidence shows that they were willing to consent to arbitration and proposed it. The trouble was that arbitration would not stop the "wild cat" strike unless the discharged employees were put back to work. The striking employees had voted not to return to work unless this was done, and plaintiff was not willing to put them back to work, and so the strike continued. Defendants cannot be held to liability under such circumstances unless under their contract they are liable for strikes which they have not authorized and do not sanction; and we cannot find any such liability in the contract.

For the reasons stated, the Court is of opinion that verdict for the defendants should have been directed and that their motion for judgment n.o.v. should have been allowed. The Court is also of the view that, even if this were not so, the verdict should not be allowed to stand. The verdict on the first trial was so excessive and so manifestly based upon improper consideration, instead of upon the record, that it should have been set aside in its entirety and a complete new trial ordered. See Ford Motor Co. v. Mahone 4 Cir. 205 F. 2d 267; Virginian Ry. Co. v. Armentrout 4 Cir. 166 F. 2d 400; Schuerholz v. Roach 4 Cir. 58 F. 2d 32, 34, cert. den. 237 U.S. 623; Dimick v. Schiedt 293 U.S. 474, 486; Brabham v. State of Mississippi 5 Cir. 96 F. 2d 210, 213-214. It was error, therefore, to order a new trial on the issue of damages and submit that issue just as though breach of contract and right to recover for destruction of business had been established, without reference to the rule of Hadley v. Baxendale 9 Exch. 341, 156 Eng. Rep. 145, or the duty of an aggrieved party to mitigate damages. We need not go into this, however, since the Court is of opinion that defendant is entitled to judgment, notwithstanding the verdict.

The judgment appealed from will accordingly be reversed and the case will be remanded with direction to

enter judgment for defendants. As defendants have printed more than twice as much matter as was necessary in the appendix to their brief in violation of our rule 10, only half the cost of printing the appendix will be taxed as costs on the appeal. Mutual Life Ins. Co. of New York v. Blodgett 4 Cir. 126 F. 2d 273, 279; Pickett v. Aglinsky 4 Cir. 110 F. 2d 628, 632; United States Galvanizing & Plating Equipment Corp. v. Hanson-Van Winkle-Munning Co. 4 Cir. 104 F. 856, 863.

Reversed.

The undersigned, of counsel for petitioner, certifies that service of the foregoing petition has been made on the United Construction Workers and the United Mine Workers of America, by depositing a copy of said petition in a United States Post Office with first class postage, prepaid, addressed to their attorneys, to wit; Stuart B. Campbell, Wytheville, Virginia, Stuart B. Campbell, Jr., Wytheville, Virginia, and M. E. Boiarsky, Kanawha Valley Bldg. Charleston, West Virginia on this the 10th day of August, 1955.

FRED B. GREEAR
Norton, Virginia

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 319

HAISLIP BAKING COMPANY, INC.,
Petitioner,

v.

UNITED CONSTRUCTION WORKERS and UNITED MINE WORKERS OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR UNITED CONSTRUCTION WORKERS AND UNITED MINE WORKERS OF AMERICA IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The Fourth Circuit's opinion is reported in ..... F. 2d ..... (Adv. Op. .....)* and in 36 LRRM 2315, and appears at pages 29 *et seq.* of the petition for *certiorari.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Questions presented are set forth in the petition (p. 2).

*Not yet reported.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are contained in Section 301, Labor Management Relations Act, 1947 (29 USCA 185), herein called "Act" or "Taft-Hartley Act", and appear in the Petition (pp. 2-4) and in the Appendix hereto.

STATEMENT

1. Pleadings, Trial Proceedings and Court of Appeals' Judgment.

Petitioner Haislip Baking Company, Inc., a corporation,[1] instituted in the United States District Court for the Western District of Virginia (at Abingdon)[2] an action under Section 301 of the Act [29 USCA 185(a)] against United Construction Workers and United Mine Workers of America[3], seeking damages[4] for alleged breach of contract. A jury returned a verdict for petitioner in the sum of $462,611.53; the trial court denied defendants' motion for judgment n.o.v. or for a new trial, but awarded a new trial limited to damages sustained by petitioner "by being obliged to liquidate its business"; on a second trial the jury awarded damages in the sum of $165,000.00; upon appeal from judgment for petitioner in that amount, the Fourth Circuit reversed the judgment and remanded the case with direction to enter judgment for defendants.

The complaint charged, *inter alia*, that on April 23, 1949, petitioner executed a written collective bargaining

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1 Herein called either "petitioner", "plaintiff" or "Company".

2 Herein called either "trial court" or "District Court".

3 When referred to herein collectively, United Construction Workers and United Mine Workers of America will be called, as in the trial court, "defendants"; and when referred to singly will be called "UCW" and "UMW", respectively.

4 Both actual and punitive damages were sought, but in the first trial the trial court sustained defendants' motion for summary judgment as to punitive damages (D.A.30), and, in the second trial, struck out petitioner's claim for punitive damages (D.A. 45). [Note: The abbreviation "(D.A.)" refers to defendants' appendix used in the Court of Appeals which petitioner has filed in this Court.]

4a Unless otherwise indicated, all dates refer to the year 1950.

contract with UCW, which had been renewed on April 23, 1950[4a]; that on May 29 two of plaintiff's employees, having failed to report for work and to give a satisfactory explanation therefor, were suspended by the Company; all of petitioner's employees, members of UCW, walked out and the bakery was closed; at a meeting on May 30 with Joe Morris, UCW Regional Director, Morris conferred with the employees and then informed petitioner it could resume operations provided the two suspended employees were put back to work promptly with full rights; plaintiff took the position that such action would be a violation of the contract and told Morris the Union had a complete remedy under its arbitration clause, to which Morris replied that he would not discuss the contract and then, with the remark "Let's all go home", walked out, and since that date petitioner's plant has been closed and unable to resume operations; and as a result thereof plaintiff had sustained a loss both in materials and in present and future profits.[4b]

Separate answers filed by defendants (D.A. 8, 26) set up, among others, the following defenses:

> 1. Each defendant specifically denied it had committed, had knowledge of, participated in or authorized or ratified the commission of any of the alleged wrongful acts against petitioner. Both defendants averred that the refusal of petitioner's employees to work was a spontaneous and voluntary act on the employees' part, for which defendants were not responsible and which they did not

[4b] Prior to the second jury trial, by leave of Court, petitioner amended its complaint, alleging that (D.A.43) as a direct result of the unlawful acts of the agents or officers of defendants in consummating the breach of the written contract, petitioner was forced to shut down its plant and lost its business and supplies on hand, and lost money on sale of its real estate, *profits it would have made from* a successful business established over a period of years; and as a result of the destruction of said business, plaintiff was damaged to the extent of $801,824.17; and, in addition, plaintiff asked for punitive damages in the amount of $250,000.00, and demanded judgment of $1,051,824.17.

authorize, encourage, ratify or approve; and that the individual employees acted on their own initiative without prompting or suggestion from defendants and were no longer willing to work in plaintiff's plant. UMW further denied that either UCW or Joe Morris was its agent.

2. Defendants denied any breach of the written contract and averred also that on May 31, 1950, the local Union agreed to return to work and a UCW representative communicated this information to plaintiff's Attorney Greear, but was informed it was too late, that petitioner had decided to close down and go out of business, and that a letter had been written informing the President of the local Union, UCW's field representative and Morris, UCW's Regional Director, of this fact, and that all employees had been instructed to call at the Company office and receive their wages. This letter (D. A. 165-166) reads as follows:

"Greear, Bowen, Mullins and Winston
Attorneys at Law
Norton, Virginia

Fred B. Greear — Telephone 199
Wm. T. Bowen
Leslie M. Mullins — May 31, 1950
Robert T. Winston, Jr.

Mr. James Starnes, President
Local Union
United Construction Workers
Norton, Virginia

Mr. Marshal Belcher
United Construction Workers
East Stone Gap, Virginia

Mr. Joe Morris, Regional Director
United Construction Workers
Post Office Box 241
Kingsport, Tennessee

Gentlemen:

Due to the fact that the members of the Local Union ..... of the United Construction Workers has refused to abide by the terms of its contract with the Haislip Baking Company in defiance of the specific instructions of the Regional Director of the Union and its local field representative, and have thereby, through their present wildcat strike, destroyed the business of the Haislip Baking Company so that its customers have necessarily turned to other baking companies for their supplies, the Haislip Baking Company has decided that it will not be possible to operate the Bakery at a profit in the future. Accordingly, I am directed to advise that the Haislip Baking Company has gone out of business. All of the employees of the Company may call at the Company's office between 11:00 a.m. and 12:00 noon on Saturday, June 3, 1950, at which time they will receive any and all wages due them to the date on which they quit.

Very truly yours,
(s) Fred B. Greear
Fred B. Greear
Attorney for Haislip
Baking Company".

3. Defendants denied that they were responsible for the destruction of plaintiff's business and denied that plaintiff had a long continued and successful business and averred that plaintiff had repudiated the contract by its letter of May 31, 1950.

Two jury trials were had: In the first, at the conclusion of plaintiff's evidence (D.A. 283), and again at the conclusion of all the evidence (D.A. 403), defendants moved for a directed verdict for UMW and UCW, which motions the court overruled and defendants noted their exceptions (D.A. 284, 405); the jury returned a verdict "against

both defendants, and fix the damages at $462,611.53" (D.A. 38), considering the case only for fifty (50) minutes (D.A. 427), although the trial had consumed four (4) days and the court's jury charge consisted of eleven (11) pages (D.A. 416, *et seq.*); upon motion of defendants to set aside the verdict and judgment entered thereon and for judgment *non obstante*, and for judgment in accordance with defendants' motions for a directed verdict, or in the alternative, for a new trial, the trial court held that the verdict "constitutes a proper and sufficient finding of liability" against defendants, but it "appearing to the court that the amount of damages . . . is excessive", the trial court ordered a new trial "solely upon the issue of the amount of damages" (D.A. 41). Defendants excepted (D.A. 41).

A second jury trial, had on the question of damages only, resulted in a verdict against both defendants for $165,000.00 (D.A. 49, 467), judgment was thereupon entered on the verdict against both defendants (D.A. 49); defendants' motion to set aside the jury verdict and judgment rendered thereon and for judgment in accordance with defendants' motion for directed verdict, or in the alternative, for a new trial was overruled (D.A. 50-51). Upon defendants' timely appeal to the United States Court of Appeals for the Fourth Circuit[5], that Court, on June 13, 1955, rendered its opinion and judgment reversing the judgment complained of and remanding the case "with direction to enter judgment for defendants" (Pet. 39-40).

2. The Facts and the Court of Appeals' Opinion.

The pertinent facts, as disclosed by the record, and as shown in the Fourth Circuit's opinion, may be summarized thus:

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[5] Herein called "Fourth Circuit", "Court of Appeals" or "appellate court".

With a net cash investment of $15,300, petitioner operated a bakery in Norton, Virginia, from August 1, 1939, until May 29, 1950. Its stockholders consisted solely of members of the Haislip family: Mr. and Mrs. Fred Haislip, Sr. and their two sons, Fred, Jr. and Hampton.

The Collective Bargaining Contract.

On April 23, 1949, plaintiff executed a collective bargaining contract with UCW, which was renewed on April 23. This 1950 contract was signed by Haislip Baking Company and by UCW, affiliated with UMW (D.A. 21), and was for a one (1) year term, but either party could terminate it "on an earlier date by giving at least sixty (60) days' notice, in writing" (D.A. 20-21). *Neither the 1949 nor the 1950 contract was signed by UMW.*

The 1950 contract provided, *inter alia*, for rates of pay, hours of work and conditions of employment of the company's employees "during such time as such persons are willing and able to work" (D.A. 12); any employee who failed to report for work or make satisfactory explanation of his absence was considered "a voluntary quit and shall lose his seniority rank"[6]; and a dismissed employee was not to be immediately discharged but first suspended, and he could appeal his case through the grievance committee and "unless then settled *within three (3) days* (excluding Saturdays, Sundays and Holidays) could carry the case through to an Umpire or Arbitrator as herein provided", and an illegally discharged employee would be reinstated with back pay[7] (D.A. 16-17). Under Article IX, three members of the Local Union composed a Grievance Committee "which shall take up and seek to adjust grievances" arising from time to time and meet with management "on all matters pertaining to the provisions of this contract, and all matters of dispute between the

[6] Article VII.
[7] Article VIII.

Union and the Company" (D.A. 17); and "Avenues of Grievances adjustments" were (1) between the employee and his foreman or supervisor, (2) between the Grievance Committee and the Company's general manager, and (3) between UCW's district representative and said general manager (D.A. 17). If the "above process of adjustments" failed of settlement "*within seven (7) days*", Article X provided (D.A. 17) for submission of the dispute to a Board of Arbitrators "whose decisions shall be final". In Article XVI, the contracting parties agreed "that, as a part of the consideration of this agreement, *any and all disputes, stoppages, suspensions of work*, and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties, settled and determined exclusively by the machinery provided in the 'Settlement of Disputes' in Articles IX and X of this agreement, or by the full use of free collective bargaining as heretofore known and practiced"[8] (D.A. 20).

The 1950 contract was similar in all respects to that which the parties had executed in 1949, except that the 1950 contract provided for a postponement of an increased wage scale until June 23 and, in the case of salesmen, if the Company deemed it necessary or expedient, to a date "to be fixed by the management so that said later date shall not exceed 60 additional days from June 23, 1950" (D.A. 15). The Company's president would not deny that he had stated, "By that time I will either be making enough money to pay that increase or be going out of business" and testified that the statement "doesn't sound so improbable" (D.A. 81), admitting that "we hadn't been doing very well" (D.A. 81).

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[8] In addition, Article XVI provided for reopening the contract "with reference to a change in the wages paid to employees as provided herein".

The Company's Financial Situation in May, 1950.

The provision in the 1950 contract for a postponement of wage increases is significant in relation to the Company's financial position during its operations in 1950. Between 1939 and December, 1948, the Company had expanded its production capacity from 400 loaves of bread per hour to 1200-1500 loaves per hour and had constructed a new building, which it first occupied in December, 1948, with a production capacity of about 3500 loaves per hour. The Company's 1939-1948 operations were financially successful and consistently showed a profit, reaching a maximum in 1947 of $48,311.77, but which decreased to $13,329.23 in 1948. In 1949, there was a net loss of $1,336.21 (D.A. 437); and during its operational period in 1950 there was a net loss of $6,336.17 (D.A. 438). In addition to this financial loss, the Company also experienced production difficulties and was forced to call in management experts to revamp its operation; and although it had operated in its new building for more than a year when the May 29, 1950, strike occurred, it had not been able to get its machinery to function properly (D.A. 267).

Work Stoppage of May 29, 1950.

Although the contract signed between plaintiff and UCW provided for the dismissal of employees who were absent without satisfactory explanation, this provision had not been enforced by the management (D.A. 66). Several weeks before May 29, Fred Haislip, Sr., plaintiff's president, told Fred Haislip, Jr., plaintiff's manager in Norton, that he should enforce the "voluntary quit" provisions in the contract (D.A. 67). On Sunday, May 28, Fred Haislip, Jr., telephoned his father that two employees, James Hensley and Lloyd Walters, were absent without permission and Haislip, Sr., said that he would come

to Norton the next day in case there was trouble about discharging these two employees (D.A. 66).

On Monday afternoon, May 29, when Hensley and Walters reported for work, the foreman informed them that they were discharged. All of the employees then on duty at the plant quit work and walked out in protest. After unsuccessful efforts had been made to settle the matter with the local union president (D.A. 358), management tried to telephone Marshall Belcher, Field Representative of UCW, but he was not at home, and it called Joe Morris, UCW Regional Director in Kingsport, Tennessee. Arrangements were made for a meeting at the plant on Tuesday morning, May 30. Witnesses for both plaintiff and defendants admit that the strike on Monday, May 29, was a spontaneous act of the employees caused by the Company's dismissal of Hensley and Walters, and neither defendant had anything to do with it (D.A. 88, 94, 105, 111, 115, 121, 138, 147, 150, 290, 300, 305, 311-312, 323, 332, 334), and the District Court so found (D.A. 420). When plaintiff's witness Hubbard was asked, on direct examination, if Morris or Belcher ever advised the employees to strike, Hubbard replied, "No, sir" (D.A. 110).

Events of Tuesday, May 30, 1950.

Tuesday morning, Morris and Belcher, representing UCW, came to the bakery and met with the three Haislips and Fred B. Greear, plaintiff's attorney. The members of the local union grievance committee were also present and there were a number of bystanders, mainly driver salesmen who were not present in any official capacity and who took no part in the discussion. The sole issue between management and its employees narrowed to one of timing, that is: Should Hensley and Walters be permitted to return to work and *their case then arbitrated as a grievance;* or *should the arbitration*

be first, and the dischargees await its outcome (D.A. 340). After some discussion about wildcat strikes and the cause of the work stoppage at the bakery, during which, petitioner's president states that Morris declared that "this is an outlaw strike, I don't like outlaw strikes, I like to abide by contracts" (D.A. 61), the Haislips and Attorney Greear left the room so that Morris could consult with the employees (D.A. 61). While some of plaintiff's witnesses related they knew nothing about a meeting of the employees on Tuesday morning, Stella Wilson, a witness for plaintiff, admitted (D.A. 152)—and she is corroborated by numerous witnesses for defendants and by witnesses for plaintiff, including plaintiff's attorney Greear (D.A. 95, 232)—that such a meeting was held. The evidence shows that a large number of employees had gathered outside plaintiff's plant near the gas tanks at the loading en' ance and Belcher went there and told them that the proposal had been made that the employees go back to work without reinstatement of Hensley and Walters and that their dismissal be taken up as a grievance. Belcher's undisputed statement is that he himself "asked someone to make a motion *they return to work*" (D.A. 382). On this occasion, as Belcher testified (D.A. 382), he advised the employees "they ought to return to work and let us take the case up according to the grievance procedure in the contract". Not only is there no contradiction of Belcher's testimony, but numerous employees corroborate it (D.A. 292, 304-305, 310, 340, 358, 365, 375). As witness Starnes put it, the employees voted against Belcher's advice (D.A. 340). A motion was made and seconded that the employees return to work and a vote was taken by show of hands. A majority of the employees present voted not to return to work until Hensley and Walters had been reinstated. After such vote, witnesses related that Belcher voiced the opinion that the employees had made "a mistake" (D.A. 321) and a "bad

decision" (D.A. 332) and "were doing wrong in not going back" (D.A. 379).

The Fourth Circuit, in its opinion (Pet. 31), declared that:

> ". . . there is evidence that Belcher advised the men to go back to work without insisting on the reinstatement of the discharged employees but that they voted that they would not do so but would return to work only if the discharged employees were reinstated."

After about thirty or forty-five minutes, the Haislips and Greear returned to the meeting and were informed by Morris that the plant could reopen right away if the two men were reinstated. The Haislips took the position that this would be a violation of the contract, and Haislip, Sr. testified (D.A. 61-62), that Morris replied that the contract was not in issue and was not to be discussed. Finally, Morris, Belcher and the grievance committee started to leave, and Haislip, Sr. said, "you are putting us out of business, and we will hold you responsible", to which, according to Haislip, Morris replied, "We have been sued before" (D.A. 62). One of plaintiff's witnesses testified that Haislip said: "I will sue you" (D.A. 107-108), and that this remark prompted the above reply. Morris then walked out of the building, spoke to two or three employees outside, got in his car and left. There was evidence by witnesses for plaintiff that when one of the employees asked Morris when they were to go back to work he said, "You will go back to work when I tell you and not before" (D.A. 84, 108, 112)[9]; but the Fourth Circuit observed (Pet. 31) that:

> ". . . this was after they had voted not to return to work unless the discharged employees were re-

[9] Morris returned to Kingsport and played no further part in the dispute. He died before the trial (D.A. 380-381).

instated and after the conference had broken up because of Haislip's insistence that he would not reinstate them. *There is no evidence that at this, or any other time either Morris or Belcher attempted to prevent their returning to work and the evidence is that Belcher advised them to return to work without insisting on the reinstatement of the discharged employees and, after the vote was taken, told them they had made a mistake.*" (Emphasis supplied.)

After Morris and Belcher left the meeting, the Haislips and Greear consulted awhile among themselves.

Events of Wednesday, May 31, 1950.

The morning of Wednesday, May 31, at about 7:30, Haislip, Sr. left Norton to return to his home in Logan, West Virginia. That afternoon Fred Haislip, Jr. left for a fishing trip in Florida. Hampton Haislip was the only member of the family or officer of the corporation who remained in Norton and he had been in the bakery only from February, 1950 until the work stoppage, and seemed not to have taken any part in the discussion nor to have exercised any authority in the matter.

On the same day, Belcher arranged for (D.A. 382), and the local union called, a meeting at the local union hall at Dorchester, Virginia, which was attended by forty or forty-five members (D.A. 383). Belcher was present and his position was that the employees should return to work (D.A. 383). According to witness Wright, Belcher told the employees that, "in order to settle the grievance *they should and would have to return to work*, that their contract called to settle the matter according to the grievance procedure by the Grievance Committee" (D.A. 359). The statement of witness Walters is that "Belcher again talked to us to get us to go back to work" (D.A. 292). As witness John Marshall testified, Belcher asked the em-

ployees to go back [to work] and let the Arbitration Board handle the matter (D.A. 305). Other testimony is corroborative of Belcher's statements and position (D.A. 311, 316, 318, 359, 368, 375, 379) and no witness denies the fact of such meeting or the action taken. After some discussion a vote was taken and a majority of the employees present voted to return to work without requiring the prior reinstatement of Hensley and Walters. Belcher and the Grievance Committee were to notify the Company of the employees' agreement to return to work (D.A. 383). Upon Belcher's leaving the meeting, he went directly to Greear's office and informed Greear of this fact (D.A. 384). Belcher's reason for going to see Greear was due to his being informed that Haislip, Jr. and Haislip, Sr. were out of town, "We had never in dealing with the bakery done any business with Hampton Haislip", and "Greear was always present and he was present that Tuesday morning in the meeting" (D.A. 384). Greear testified that on that occasion he was not informed that the employees had voted to go back to work but that he was so informed by Belcher "either a day or two" later (D.A. 234). However, Belcher was positive that he informed Greear on May 31 of the employees' vote. The Fourth Circuit observed that "(w)hich is correct is not important" (Pet. 32). In any event, both Greear and Belcher agree that on May 31 Greear handed Belcher a copy of the letter that he had mailed to Morris, Belcher, and Starnes, Local Union President, which had been written sometime that morning and stating that:

> "Due to the fact that the members of the Local Union ..... of the UCW has refused to abide by the terms of its contract with the Haislip Baking Company *in defiance of the specific instructions of the Regional Director of the Union and its local field representative, and have thereby,* through their present wildcat strike, destroyed the business of

> the Haislip Baking Company. . . . Accordingly, *I am directed to advise that the Haislip Baking Company has gone out of business.*" (Cross Ex. D-1, D.A. 165). (Emphasis supplied).

This letter, which was signed "Fred B. Greear Attorney for Haislip Baking Company", was admittedly written by him upon instructions from "one of the Haislips" (D.A. 237). Haislip, Sr. admitted that he "probably" told Greear to write the letter after the meeting at the plant on May 30 (D. A. 63). After its receipt by the union representatives no further contacts were made between the union and the management. As the Fourth Circuit observed (Pet. 31),

> "There is no evidence of any further effort on the part of plaintiff to operate the bakery or to negotiate with defendants."

In its opinion (Pet. 32-33), the Fourth Circuit declared that it was not important

> ". . . whether the Haislips learned of the results of the Dorchester meeting, although it is inconceivable that they should not have learned of it promptly. *The important fact is that immediately following the meeting on May 30, plaintiff went out of business and so notified the officers of the union, without making any further attempt to reach an agreement with the employees or to minimize the damages resulting from their action.*" (Emphasis supplied.)

Likewise, the Fourth Circuit questioned the bona fides of plaintiff's claim because more than two (2) years elapsed after the May, 1950, occurrences before action was instituted. The Fourth Circuit (Pet. 33) declared:

> "It is a most pertinent circumstance bearing upon the bona fides of plaintiff's claim that action was not instituted until more than two years after the occurrences now relied upon as constituting breach

of contract and giving rise to the damages claimed".

Belcher explained that he then went to Town Hall in Norton and talked to the town Manager and Mayor "to try and get them to see if they could talk to Mr. Haislip and see if they could get him to reconsider reopening the bakery" (D.A. 385). Belcher passed plaintiff's plant where he saw a sign, described as a cardboard about "two and a half feet" and reading "Closed—Gone out of Business" (D.A. 385). Although some of plaintiff's witnesses deny seeing such a sign and assert that the only sign posted notified the employees to come for their pay on the following Saturday (D.A. 96, 104, 113, 134), and Hampton Haislip stated he posted no other notice than the pay notice (D.A. 160-161), one of plaintiff's witnesses admits seeing a sign other than the one concerning pay (D.A. 152), Haislip, Sr. testified, with reference to the "Closed—Gone out of Business" sign, that "Hampton, my son, put that up" and had authority to do it (D.A. 78), and numerous other witnesses related that they saw the sign (D.A. 295, 302, 305, 311, 316, 321, 331, 341, 359, 365, 369, 372, 377, 379).

Later that night a citizens' committee called at the bakery and talked to Hampton Haislip in an attempt to settle the dispute or have the bakery reopen (D.A. 285, 287). A participant in that meeting said that it was his impression that there was no desire on Hampton's part to reopen the business (D.A. 288). Contrary to Hampton's testimony that it was suggested that petitioner open as non-union, the Town Manager could recall no such suggestion (D.A. 285-6).

Events After May 31, 1950.

The Company did not reopen for business and the employees made claims for unemployment compensation. A hearing upon such claims was held at Appalachia, Vir-

ginia, on September 19, 1950, at which Fred Haislip, Sr., Fred Haislip, Jr., Hampton Haislip, W. T. Bowen, their attorney, Marshall Belcher, and various employees were present. Although the Haislips now claim that they did not learn of the Greear letter for some two years (D.A. 72, 162, 258), the transcript of the Unemployment Commission hearing shows that Belcher testified there as to the receipt of the letter and as to its contents.[10] It also shows that at that time Fred Haislip, Sr., stated that the company determined to go out of business on the day after the strike (D.A. 325) and that the sign "Closed—Gone out of Business" from "that day on" was correct—"we were out of business" (D.A. 326). It also appeared that at the hearing, Haislip, Sr. testified that Morris asked the employees to go back to work on May 30 and they refused (D.A. 325-326).

The Court of Appeals believed (Pet. 35) that defendants' exceptions to the jury charge, on the ground that there was no evidence to support a finding that either Morris or Belcher participated in, ratified or encouraged the strike's continuance, or that what they did or did not do with respect thereto was authorized by or was otherwise binding upon the defendants, were "well taken" and was "of opinion that verdict for the defendants should have been directed and that their motion for judgment n.o.v. should have been allowed"; that the "verdict on the first trial was so excessive and so manifestly based upon improper considerations, instead of upon the record, that it should have been set aside in its entirety and a complete new trial ordered"; that it "was error, therefore, to order a new trial on the issue of damages and submit that issue just as though breach of contract and right to recover for destruction of business

[10] See testimony of Dorothy Gathright, a hearing reporter with the Unemployment Compensation Commission, who reported the September 19, 1950, hearing (D.A. 323 et seq.).

had been established, without reference to the rule of *Hadley* v. *Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145, or the duty of an aggrieved party to mitigate damages", which the Fourth Circuit deemed unnecessary to consider since "defendant is entitled to judgment, notwithstanding the verdict"; and reversed the judgment appealed from and remanded the case with direction "to enter judgment for defendants" (Pet. 39-40).

ARGUMENT

I. "Did the Defendant Unions Violate the Contract?"

In contending that defendants violated the 1950 contract, petitioner contends that the jury verdict in favor of plaintiff is conclusive upon the Fourth Circuit on this issue and that the appellate court "departed from the usual course of judicial proceedings in failing to accept as true" petitioner's evidence and all fair inferences to be drawn therefrom (Pet. 19.). Discussion of this question which follows will demonstrate that this reason assigned for this Court's reviewing the instant case has no merit. The reason assigned ignores this Court's frequently-enunciated rule that it does not "grant certiorari to review evidence and discuss specific facts" (*U. S.* v. *Johnston,* 268 U. S. 220, 227; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175) and overlooks the fact that the trial court did not, in its charge, specifically charge the jury to ascertain whether defendants had violated the collective bargaining agreement. Furthermore, the evidence on which petitioner relies does not support a finding of such violation.

Petitioner asserts (Pet. 15-19) that the evidence showed that UCW Regional Director Morris refused to submit the dispute to arbitration; but it must be noted that the controversy was not whether the dispute would be arbitrated but whether, during arbitration, the dis-

charged employees would be permitted by petitioner to return to work. Such is the testimony of witnesses for both petitioner (D.A. 115, 125)[11] and defendants (D.A. 381)[12] and thus justifies the Fourth Circuit's statement that "the evidence shows that they [Morris and Belcher] were willing to consent to arbitration and proposed it" (Pet. 39), which petitioner challenged on the ground that the conclusion is "based on Defendant's evidence, which was rejected by the jury" when, in reality, this was not a matter submitted to the jury for determination.[13]

To support its charges that defendants violated the contract because Morris refused to submit the matter to arbitration and would not discuss the contract, petitioner refers to testimony without regard to, and totally disassociated from, the circumstances which occasioned it.

Petitioner's references to testimony that Morris refused to submit the dispute to arbitration assiduously avoid Belcher's entreaties to the employees at the May 30 meeting that they should return to work during the arbitration procedures without the discharged employees and the employees' vote to do so only if the discharged men were reinstated (infra, p. 11) and the employees' own determination, in the face of Belcher's implorations, not to return to work without the discharged men. The

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[11] The record discloses the following questions and answers on cross-examination of petitioner's witness Jack McDonald (D.A. 115):

"Q. The Union said we won't go back to work unless you put the boys back and Haislip said he won't put the boys back you come back without them? A. Haislip wanted the plant to go back in operation without the boys and then arbitrate it.

"Q. And the Union wanted to put the boys back and then take it up, that is right, isn't it? A. Yes, sir, I believe so.....

"Q. That was the only thing between them, and you were in that meeting on Tuesday morning? A. Yes, sir."

[12] There is no denial of UCW Representative Belcher's testimony (D.A. 381) that "we proposed to him that if he would agree to let the two men . . . return to work . . . then we would proceed with their case through the grievance procedure . . ." but that Haislip, Sr. took the position "to leave the two boys off from work and arbitrate the case, if necessary . . ."

[13] See trial court's jury charge (D.A. 416 et seq.).

Fourth Circuit gave proper consideration to this uncontradicted evidence[14], noting in its opinion that " . . . there is evidence that Belcher advised the men to go back to work without insisting on the reinstatement of the discharged employees" (Pet. 31), and cogently observing that the employees "voted that they would not do so but would return to work only if the discharged employees were reinstated" (Pet. 31).

Petitioner complains also that UCW Regional Director Morris could have gotten, but did not try to get, the employees to return to work (Pet. 18). Morris was aware of Belcher's efforts to have the employees return to work and the employees' refusal so to do. *American Hawaiian S. S. Co.* v. *Sailors Union, etc.* (D.C., N.D., Calif., 1941), 37 F. Supp. 828, makes it clear that:

> "Respondent can not compel men to work; it can only . . . try to persuade them to take such work . . .",

and even petitioner's witnesses readily admit they could not or would not have returned to work unless a majority of the employees had voted to do so (D.A. 90, 96, 142), and that the representatives could not tell them to go back unless they were willing to resume their work (D.A. 126). In relying upon the statement in the petition (p. 18), petitioner has wittingly shut its eyes to Belcher's undisputed efforts of May 30 to have the men return to work; it has disregarded sedulously its Attorney Greear's written exculpation of Morris and Belcher when, in his letter of May 30, he admitted that the employees had acted "*in*

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[14] While some of petitioner's witnesses testified they knew nothing about an employees' meeting on May 30, such testimony, being negative in character, has no probative value in the light of positive testimony by witnesses for both petitioner and defendants that such meeting did take place. 20 Am. Jur., Evidence, section 1186, p. 1037, citing *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76; *Virginia Auto. Mut. Ins. Co.* v. *Brillhart*, 187 Va. 336, 46 S.E. 2d 377 (1948); *Nichols* v. *Southern Ry. Co.*, 187 Va. 89, 45 S.E. 2d 913 (1948); *Baltimore & Ohio R. Co.* v. *Griffith*, 44 F. 574, affirmed 159 U.S. 603.

defiance of the specific instructions of the Regional Director of the Union and its local field representative"; and has carefully overlooked Haislip, Sr.'s testimony that he would not deny having stated on a prior occasion that "Morris asked them [the employees] to go back and they refused" (D.A. 79).

Furthermore, the contract expressly allowed additional time for negotiation of the disputed matter. Article X[15] thereof allowed a period of seven days for negotiation before arbitration could be demanded, while Article VIII provided that "Within three (3) days . . . following such suspension, the employee or the Union may appeal the case through the Grievance Committee to the Company, and unless then settled within three (3) days . . . may also carry the case through to an Umpire or Arbitrator as herein provided" (D.A. 4). Hence, within either contractual period, the Company had caused the Greear letter to be written, had closed its plant and so notified its employees, and had foreclosed all negotiations and arbitration. In quoting the Fourth Circuit's opinion (Pet. 39) which rejected petitioner's contention that Morris and Belcher had refused to arbitrate, petitioner has omitted a pertinent and realistic observation of the Fourth Circuit predicated upon the undisputed facts, reading (Pet. 39):

> "The trouble was that arbitration would not stop the 'wild cat' strike unless the discharged employees were put back to work. The striking employees had voted not to return to work unless this was done, and plaintiff was not willing to put them back to work, and so the strike continued. Defendants cannot be held to liability under such circumstances unless under their contract they are

[15] Article X, Section 1, of the collective bargaining contract reads: "In the event that the above process of adjustments do not result in settlement of differences, *within seven (7) days*, it is mutually agreed by the Company and the Union that the case in dispute may be referred to a Board of Arbitrators to be created as hereinafter provided, whose decision shall be final" (D.A. 4).

> liable for strikes which they have not authorized and do not sanction; and we cannot find any such liability in the contract."

It is thus evident that a jury verdict that defendants had violated the contract is not supported by substantial evidence so as to compel the Fourth Circuit to accept as true the statements relied upon as they concern the first question posed. We submit that there is no occasion for a further consideration of the sufficiency of the evidence by this Court. It is well-established that a jury verdict founded upon insufficient evidence should not have the approval of an appellate court. *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654;[15a] *Geo. D. Horning, Inc.* v. *McAleenan*, 4 Cir., 149 F. 2d 561 (1945), cert. den. 326 U. S. 761; *Hamilton Foundry & Machine Co.* v. *International etc. Union of North America*, 6 Cir., 193 F. 2d 209 (1951), cert. den. 343 U. S. 966.

It is thus seen that there is no merit in the reason assigned by petitioner for this Court's review of this question. In addition, this phase of the case presents neither a conflict of decisions nor any substantial question warranting review.

II. "Did the Agents of the Defendant Unions Participate in, Ratify or Encourage the Continuation of the Strike?"

In its charge to the jury, the trial court premised liability of both defendants upon jury belief that Morris and Belcher, "either or both agents of the defendants, acting within the scope of their authority, participated in, ratified or encouraged the continuation of the strike" (D.A. 421).[16] In both the trial court and in the Court of

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[15a] The Second Circuit, holding the evidence insufficient, set aside a jury verdict. This Court denied certiorari upon plaintiff's challenge of the appellate court's ruling on the sufficiency of the evidence. 295 U. S. 656, also 293 U. S. 577.

[16] Defendants' objection (7) to the charge was overruled and exception noted (D.A. 426-427).

Appeals defendants argued that the evidence did not warrant a jury verdict that Morris and Belcher participated in, ratified or encouraged the continuation of the strike. The Fourth Circuit, in its opinion, declared that:

> "The question is not whether they [Morris and Belcher] did everything they might have done, but whether they encouraged or prolonged the continuance of the strike. *There is no evidence of any sort that they did.*" (Pet. 36) [Emphasis supplied.]

Petitioner's complaint is that there was ample evidence to support the jury's finding that they did. As factual support, petitioner points to statements attributed to Belcher at union meetings prior to the strike (Pet. 20) by petitioner's witnesses, such as: Haislips had too much invested and would not close down; "put the pressure on the Haislips"; and "Hold out, if you get anything you have to strike for it". It is admitted by petitioner's witnesses that the matter of a strike at the plant was not mentioned by Morris or Belcher at any local union meeting (D.A. 93-94, 110); that the strike which occurred on May 29 came as a surprise (D.A. 88, 114, 125, 138, 146, 147, 150); and that defendants had nothing to do with it (D.A. 88, 94, 105, 111, 115, 121, 138, 147, 150, 290, 300, 305, 311-312, 323, 332, 334). Both the trial court and the Fourth Circuit rejected any contention that defendants had anything to do with the strike in its inception. The trial court was explicit in its charge to the jury that "The evidence shows that the strike . . . had not been previously planned, and was certainly not specifically authorized by either Morris or Belcher" (D.A. 420). The Fourth Circuit agreed, stating (Pet. 35):

> "What we are dealing with is, not a case where circumstantial evidence points to instigation of a strike by defendants or the agents who represented them, but a 'wild cat' strike of local origin, without anything to suggest that defendants or their

> agents had anything to do with bringing it about. Morris and Belcher were called in to try to end the strike and get the men to go back to work, and everything that they did was directed to that end. Even if the testimony as to their advising the men to go back to work be disregarded and it be assumed that they did nothing of the sort, there is no evidence to support the view that they adopted the strike, that they encouraged it or that they prolonged it."

Petitioner also undertakes to utilize, as a factual predicate to support the jury finding, a statement which witnesses ascribed to Morris that "You will go back to work when I tell you and not before" (Pet. 21). This statement, according to petitioner's witnesses, allegedly was made just after termination of the Tuesday conference with the Company. Petitioner contends (Pet. 21) that Morris thereby ratified the strike and encouraged its continuance; but the Fourth Circuit appropriately said (Pet. 31) that "this was after they [employees] had voted not to return to work unless the discharged employees were reinstated and after the conferences had broken up because of Haislip's insistence that he would not reinstate them. There is no evidence that at this, or any other time, either Morris or Belcher attempted to prevent their returning to work". Further refuting petitioner's contention of ratification and encouragement is the undisputed evidence of Belcher's efforts of May 30 to get the employees to return to work and his telling them, upon their decision not to return, that they had made a "mistake", a "bad decision" and "were doing wrong" (D.A. 321, 332, 379). Also, on the following morning Belcher arranged for the Dorchester meeting at which he told the employees that "in order to settle the grievance they should and would have to return to work" (D.A. 359, 305, 292, 311, 316, 318, 341, 368, 375, 379), the employees then

voted to return without requiring the prior reinstatement of the discharged employees, and Belcher and Local Union President Starnes advised petitioner's attorney of the employees' determination. Moreover, at a time when the incident was clear in his mind, petitioner's Attorney Greear wrote the May 31 letter in which he stated that the employees *in defiance of the specific instructions of the Regional Director of the Union and its local field representative* . . . have destroyed the business". Properly finding that everything that Morris and Belcher did was directed to getting the men to go back to work (Pet. 35), the Fourth Circuit significantly noted that (Pet. 32-33):

> "The important fact is that immediately following the meeting on May 30, plaintiff went out of business and so notified the officers of the union, without making any further attempt to reach an agreement with the employees or to minimize the damages resulting from their action . . ."

Appropriately, it is submitted, did the Fourth Circuit conclude that "There is no evidence of any sort that" Morris and Belcher, or either of them, "adopted, encouraged or prolonged the continuance of the strike". Contrary to petitioner's contention (Pet. 22) that the appellate court departed from the accepted and usual course of judicial proceedings, in approving defendant's exceptions to the trial court's jury charge and their motion for directed verdicts, it was both appropriate and requisite for the Fourth Circuit to reverse the District Court's judgment in favor of petitioner (*Geo. D. Horning, Inc.* v. *McAleenan, supra*) and direct entry of judgment for defendants (*Baltimore & Carolina Line, Inc.* v. *Redman, supra;* 28 USCA, Section 2106; see also *Johnson, Admx.* v. *New York, etc. R. Co.*, 344 U. S. 48).

Moreover, petitioner's position that the jury verdict was conclusive on the Fourth Circuit must be appraised

in the light of the fact that the trial court in appraising the jury verdict of $462,611.53 in the first trial as excessive necessarily concluded that the jury had not relied upon the evidence adduced before it in making its finding of damages. In addition to the inference of passion and prejudice raised by the verdict's size, plaintiff's counsel adverted to the mental suffering of petitioner's stockholders (D.A. 412) and frequently referred to defendants as "*this powerful labor union*" (D.A. 408). After admonishment by the trial court, counsel for petitioner called upon the jury to award an exemplary verdict to preserve the sanctity of contracts "in the grand old State of Virginia" (D.A. 416). Again petitioner's counsel, referring to the work stoppage, told the jury "it had the offensive odor of a polecat strike" and that "if the Union has to pay for this polecat strike, it will be a long, long time before there will be another one in Southwest Virginia or within the jurisdiction of this Court" (D.A. 415). The Fourth Circuit had this to say concerning the jury verdict: "The verdict on the first trial was so excessive and so manifestly based upon improper considerations, instead of upon the record, that it should have been set aside in it entirety and a new trial awarded (Pet. 39)."[17]

The quotation appearing in the Petition (p. 21) from 2 Am. Jur., Agency, pp. 166-168, is inapposite to the instant case since it assumes the existence of facts requisite to applying the legal principles enunciated in the text, and the Fourth Circuit has negatived the existence of such facts in the case at bar.

Defendants submit that there is no occasion for a further considertion of the sufficiency of the evidence by this Court which, as hereinbefore noted, does not "grant certiorari to review evidence and discuss specific facts"

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[17] This discussion is applicable to each of the other questions in the petition.

(*U. S.* v. *Johnston; General Talking Pictures Corporation* v. *Western Electric Co.*, both *supra*); the Fourth Circuit's decision, opinion and judgment are correct and present neither a conflict of decisions nor any substantial question warranting review; and the petition for a writ of cer-certiorari should be denied.

III. **"Was There Substantial Evidence to Support the Verdict of the Jury?"**

Defendants submit that the third question posed by the petition concerns the same matters which are involved in questions first and second. Therefore, the discussions set forth herein concerning the first two questions are apposite to the third question and need not be repeated. It is to be noted that, in posing the third question, petitioner has assigned no reason for granting the writ of certiorari.

IV. **"Were the Defendant Unions Bound by the Acts of Their Agents, Morris and Belcher?"**

Petitioner contends that "Morris and Belcher were clearly acting within the scope of their employment and were engaged in their employer's business and that the Union is bound by their acts" (Pet. 25). In both the trial and appellate courts defendants contended that there was no evidence to support a finding that what Morris and Belcher did or did not do with respect to the strike was authorized by or was otherwise binding upon defendants. The Fourth Circuit concluded that defendants' contentions were well taken. Petitioner argues that legal responsibility follows because Morris and Belcher signed the 1950 agreement; that the contract contemplated that Union representatives would attempt to settle any disputes; that when Morris and Belcher came to the Haislip Baking Company, they were on the Union's business and were acting in their capacity "as Union representatives";

and that whatever Morris and Belcher did while trying to adjust grievances "was binding on their employer". The Fourth Circuit reasoned, however, that "There was nothing in the contract making defendants liable for 'wild cat' strikes or requiring that they take any action with regard to them" (Pet. 36). It declared that "The real question . . . is whether the defendants, because of entering into collective bargaining agreements with plaintiff requiring that grievances be settled pursuant to the procedure provided by the contract, are liable for damages caused by a 'wild cat' strike entered upon on account of such grievances by local employees, but without the authorization or sanction of the defendants" (Pet. 36). Answering the question in the negative (Pet. 36), the Fourth Circuit further declared that there is no "responsibility on the part of a union for a strike with which it has had nothing to do" (Pet. 36).

In its jury charge the trial court premised defendants' liability upon jury belief that on May 30 "Morris and Belcher, either or both agents of the defendants, *acting within the scope of their authority,* participated in, ratified or encouraged the continuation of the strike, in violation of the contract" (D.A. 421) Herein[18] justification for the Fourth Circuit's holding that the evidence did not support a jury finding of participation, ratification and encouragement has been demonstrated. Thus, the relevancy of the issue of whether defendants were bound by their acts is obviated, and the Fourth Circuit's ruling is in reality only an additional reason for setting aside the jury verdict. But, it is submitted, the Fourth Circuit's conclusion that "there is no showing of either express or implied authority on the part of either Morris or Belcher to adopt on the part of defendants a 'wild cat' strike of this character" (Pet. 36-37) is thoroughly war-

[18] *Infra*, p. 22 et seq.

ranted. Petitioner's president credits Morris with the statement at the conference on May 30 that "this is an outlaw strike, I don't like outlaw strikes, I like to abide by contracts" (D.A. 61). The Fourth Circuit observed (Pet. 37) that the dispute "arose out of a grievance having no relation to organization or the interests of the defendants" and that (Pet. 37) "It is hardly conceivable that authority to adopt, to participate in or to encourage such strikes, which are clearly inimical to the interests of a union, should be vested in field officers or regional directors." Petitioner has, in its petition, delineated no factual basis to justify a jury finding. Significantly, the Fourth Circuit found "nothing in the record to justify a finding that either Morris or Belcher had such authority" (Pet. 37). UCW's Rules (Petitioner's Ex. 1) and UMW's Constitution are parts of the record, yet the petition points to nothing in those documents to demonstrate that Morris or Belcher had such authority to make the "wild cat" strike their own or that of defendants.

Petitioner quotes from *United Electrical Radio & Machine Workers of America* v. *Oliver Corp.*, 8 Cir., 205 F. 2d 376 (1953) which, defendants submit, does not factually parallel the instant case for, in the *Oliver* case, representatives of both the International and Local Unions participated in the local union meetings leading up to the strike, permitted the strike and encouraged the interested Union members not to return to work (205 F. 2d 386).

Contrary to petitioner's assertion (Pet. 25) that the Fourth Circuit "has decided an important question of federal law which has not been, but should be settled by this court", defendants submit that no important question of federal law has been decided but that the appellate court, in an appraisal of the evidence, has simply held that there is "nothing in the record to justify a finding that either Morris or Belcher" had either express or

implied authority to adopt on defendants' part a "wild cat" strike (Pet. 36, 37), which requires no further consideration of the sufficiency of the evidence by this Court. *U. S.* v. *Johnston* and *General Talking Pictures Corp.* v. *Western Electric Co.*, both *supra*. Rejection of such finding and remand of the case by the Fourth Circuit for entry of judgment for defendants are warranted under the *McAleenan, Redman* and *Johnson, Admx.* cases, *supra*, and 28 USCA 2106.

Because this question also involves no conflict of decisions and no substantial question warranting review, the petition for a writ of certiorari should be denied.

V. "Was It Error for the District Court to Order a New Trial on the Sole Issue of Damages?"

Upon rendition of verdict of $462,611.53 against defendants in the first trial and entry of judgment thereon, defendants moved to set aside that verdict and judgment and for judgment in accordance with defendants' motions for a directed verdict, or in the alternative, for a new trial (D.A. 39); but the trial court being of opinion that the jury verdict "constitutes a proper and sufficient finding of liability on the part of the defendants to the plaintiff" (D.A. 41), but finding that the damages awarded were "excessive", it set aside the jury verdict and judgment rendered thereon but ordered a new trial "solely upon the issue of the amount of damages", to which defendants objected and excepted (D.A. 41). Defendants argued in the appellate court that comparison of the jury verdict of $462,611.53 in the first trial, with that of $165,000.00 in the second trial showed the grossly excessive nature of the first verdict and sufficed to show that it resulted from passion, prejudice or other improper cause, and that it was error for the trial court to order a new trial limited to the issue of damages. With this fact the Fourth Circuit concurred, saying (Pet. 39) that:

> "The verdict on the first trial was so excessive and so manifestly based upon improper considerations, instead of upon the record, that it should have been set aside in its entirety and a complete new trial ordered."

The Company now asserts in its petition (p. 27) that "there was evidence in the record on which the jury could have based their verdict"; but defendants submit that, while the Company excepted to the trial court's action and order setting aside the first jury award and judgment rendered thereon (D.A. 41), it did not file a cross appeal in the appellate court, nor did it urge therein, upon defendants' appeal, that the evidence sustained the jury's award of damages. Petitioner now seeks to inject into the case at bar an issue to which it waived any objection in the Court of Appeals, and seeks now to justify the issuance of a writ of certiorari on a matter which was never raised by it in the Court of Appeals and with which the judgment of the Fourth Circuit is not concerned. This it may not do. Cyc. of Federal Procedure, (3d Ed.), Vol. 13, p. 468.

Petitioner also recites (Pet. 27) that the Fourth Circuit "stated that it was error to order a new trial on the issue of damages without reference to the duty of an aggrieved party to mitigate damages" and argues (Pet. 27) that defendants did not request an instruction on mitigation of damages, nor assign the lack thereof as an objection to the jury charge as required by Rule 51, Federal Rules of Civil Procedure. Petitioner has both misquoted and misinterpreted the Fourth Circuit's opinion. That court had concluded that petitioner had not proved breach of contract nor the right to recover from defendants for destruction of its business; and following cases decided by this Court and various federal appellate

courts[19] it had further concluded, and properly so, that the jury in the first trial had determined the issue of liability "upon improper considerations, instead of upon the record" and therefore the jury verdict "should have been set aside in its entirety and a complete new trial ordered". The Court then continued (Pet. 39):

> "It was error, therefore, to order a new trial on the issue of damages and submit that issue just as though breach of contract and right to recover for destruction of business had been established, without reference to the rule of *Hadley* v. *Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145, or the duty of an aggrieved party to mitigate damages. We need not go into this, however, since the Court is of opinion that defendant is entitled to judgment, notwithstanding the verdict."[20]

Contrary to petitioner's contention that the Court of Appeals held it error to order a new trial on the issue of damages without reference to the duty of an aggrieved party to mitigate damages, the concluding sentence of the quoted portion of the opinion makes it clear that the Court did not deem it essential to consider the issue of mitigation since petitioner had failed to prove either defendant's breach of contract or responsibility for destruction of the Company's business.

Elsewhere herein (p. 25-26) defendants have set forth the matters which sustain the Fourth Circuit's position that the first trial's verdict was "manifestly based upon improper considerations, instead of upon the record (Pet. 39).

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[19] *Ford Motor Co.* v. *Mahone*, 4 Cir., 205 F. 2d 267; *Virginia Ry. Co.* v. *Armentrout*, 4 Cir., 166 F. 2d 400; *Schuerholz* v. *Roach*, 4 Cir., 58 F. 2d 32, 34, cert. den. 237 U. S. 623; *Dimick* v. *Schiedt*, 293 U. S. 474, 486; *Brabham* v. *State of Mississippi*, 5 Cir., 96 F. 2d 210, 213-214.

[20] *Hadley* v. *Baxendale, supra*, concerns the "reasonable contemplation of the parties or forseeability" rule for breach of contract which defendants had urged.

Defendant submits that, under the facts shown in the record and under applicable law (cited in footnote 19), the Fourth Circuit's conclusion is correct. It is noteworthy that petitioner, in discussing the question under consideration, has assigned no reason for the Court's review thereof. Defendants submit there is none, since there is neither conflict of decisions nor any substantial questions requiring or warranting review.

VI. Conclusion

The foregoing discussion fully demonstrates that the Fourth Circuit was warranted in sustaining defendants' exceptions to the trial court's jury charge and their motions for directed verdict on the ground that there was no evidence to support a finding that either Morris or Belcher participated in, ratified or encouraged the continuance of the strike, or that what they did or did not do with respect thereto was authorized by or was otherwise binding upon defendants and in concluding and holding that "verdict for defendants should have been directed and that their motion for judgment n.o.v. should have been allowed"; that the Fourth Circuit's action in reversing the judgment appealed and directing entry of judgment for defendants was both appropriate and required; that the petition filed herein presents no conflict of decisions and no substantial questions warranting review; that the instant case is not one which requires further consideration of the sufficiency of the evidence; and

that this Court should apply to the instant case its rule of not granting certiorari to review evidence and discuss specific facts. The petition for certiorari should be denied.

Respectfully submitted,

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September 9, 1955.

APPENDIX

Labor Management Relations Act of 1947, Title III, Section 301 (29 U.S.C.A. 185):

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * * * * * * * *

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."